Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

78-432

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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3 3 PRINTED IN U.S.A.

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*Respondents.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to the Court of Appeals for the Fifth Circuit, enabling this Court to review the Fifth Circuit's judgment in *Weber* v. *Kaiser Aluminum & Chemical Corporation and United Steelworkers of America, AFL-CIO,* 563 F.2d 216 (5th Cir. 1977).

* Although nominally listed as respondents on this petition, Kaiser Aluminum & Chemical Corporation and United States of America actually were aligned with petitioner in the courts below. Kaiser was a co-defendant with petitioner. United States of America, after first filing an *amicus* brief in the Court of Appeals supporting Kaiser and petitioner (App. B, p. 19a, n. 2), later moved for and was granted intervention as a party in the Court of Appeals and in that new capacity continued to support the positions urged by Kaiser and petitioner.

QUESTION PRESENTED

Does the prohibition against "discrimination" contained in Title VII of the Civil Rights Act of 1964 preclude an employer and union from voluntarily agreeing in collective bargaining to adopt an affirmative action program reserving 50% of the openings in a newly-created in-plant craft training program for black bidders, where there has been no prior discrimination against blacks at that plant but the program is intended to alleviate one pervasive consequence of historic societal discrimination against blacks: the virtual absence of blacks from craft jobs.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit were issued on November 17, 1977 (Appendix B, *infra*). Timely petitions for rehearing were denied on April 17, 1978 (Appendix C). On July 5, 1978, Justice Powell signed an order extending the time for filing a petition for writ of certiorari to and including August 15, 1978 (Appendix D). On August 9, 1978, Justice Powell signed an order further extending the time for filing a petition for writ of certiorari to and including September 14, 1978 (Appendix E). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761, and is reprinted as Appendix A to this petition. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 563 F.2d 216, and is reprinted as Appendix B to this petition. The order of the Court of Appeals denying rehearing is reported at 571 F.2d 337, and is reprinted as Appendix C to this petition.

STATEMENT OF THE CASE

Introduction

This is an action brought by a white employee, on behalf of himself and a class of similarly situated white employees, alleging that an affirmative action program negotiated in collective bargaining between his employer and union discriminated against whites in violation of Title VII of the Civil Rights Act of 1964. The district court ruled that the program *did* violate Title VII, and a divided Court of Appeals affirmed. The union, believing that Title VII was not intended to prohibit voluntary, privately negotiated affirmative action programs of the type involved here, and that immediate review is important to the national interest, seeks review by this Court.

Statement of Facts

Petitioner, United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), is the exclusive bargaining representative of the production and maintenance employees at the Gramercy, Louisiana, plant of Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser"). The Gramercy plant draws its workforce from a community whose population is approximately 40% black, but in 1974 (when the challenged agreement was negotiated) only 5 of the 290 skilled craftsmen in the plant were black. The courts below have both found that Kaiser did not discriminate in its selection of craftsmen prior to 1974;[1] rather, those courts found that the small percentage of black craftsmen was the product of societal discrimination, not Kaiser's.[2]

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[1] As will soon be explained, Kaiser had hired its craftsmen "from the street," and USWA had had no role in choosing them.

[2] In the courts below, USWA argued that the statistics created a *prima facie* case of discrimination by Kaiser in selecting craftsmen, which could be overcome only by a showing by Kaiser that "business necessity" precluded its using a different selection procedure, *i.e.*, in-plant training (the plant had a substantial population of

Unlike many industrial employers, Kaiser did not (prior to 1974) have an apprenticeship or craft training program enabling in-plant production workers to train and qualify for craft positions. USWA had been urging the adoption of such a program for many years, but Kaiser had been unwilling to incur the very substantial costs which such a program would entail. In consequence, when craft vacancies arose, only fully-qualified craftsmen could compete. Kaiser early exhausted the pool of in-plant production employees who could qualify for craft vacancies, and for many years prior to 1974 virtually all vacancies were filled by the hiring of craftsmen "off the street."[3] But here was the rub: although Kaiser made substantial efforts to find qualified black craftsmen, they simply did not exist. Thus, although Kaiser's workforce included large numbers of black production workers, the pool from which Kaiser had selected its craftsmen was exclusively white, a product of historic societal discrimination, but not, as the courts below found, Kaiser's discrimination.

The picture at this plant—a virtually complete absence of blacks from craft positions—reflects what was, until 1974, a phenomenon which troubled the union throughout its jurisdiction. Although many industrial plants employ

black production workers). Both courts below, however, ruled that the evidence did not show that Kaiser had engaged in discrimination in violation of Title VII (App. A, pp. 5a, 15a; App. B, pp. 31a-33a). Given the two-court rule, that nondiscrimination finding is binding here, *e.g., Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1961), and, accordingly, we now seek review only on the basis of the alternative position urged below, which position, as set forth in the question presented herein, does not depend upon a finding of discrimination by the particular employer.

[3] The lone exceptions, which the court below considered *de minimis* (App. B, pp. 31a-32a, n. 13), involved 28 vacancies which were filled by providing limited training to employees who already had substantial craft-related experience. This was much less expensive than a full-blown training program, because the recipients, by virtue of their prior craft-related experience, required a much shorter training period.

large numbers of blacks as did Kaiser here, there were very few blacks who had become craftsmen anywhere in American industry. In 1974, USWA embarked upon a nationwide program to alter this picture. In major segments of its jurisdiction—including the steel, aluminum, and can manufacturing industries—USWA negotiated temporary "quotas"[4] under which 50% of future craft and craft-training vacancies were to be awarded to qualified blacks and other minorities until their statistical underrepresentation was eliminated.[5] While employer discrimination may have accounted for the underrepresentation of black employees in craft jobs at some of the plants covered by these agreements, the agreements were not confined to curing past employer discrimination, and no effort was made to assess on a plant-by-plant basis the employer's potential culpability for the absence of black craftsmen. (See n. 5, *supra*). USWA's intention—the lawfulness of

[4] The term "quota" was not used in the agreements, but we do not quarrel with the use of this term by the court below to characterize the agreement.

[5] In the steel industry, this agreement was incorporated into an industrywide consent decree receiving judicial approval. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976). However, as the decree court has recently stated, the "essence" of that decree "is a collective bargaining agreement between the union and the companies"; neither the parties nor the court had examined the facts at each of the 250 plants covered by the decree to determine whether there had been prior employer discrimination, nor had the parties or the court attempted to limit the quota to identifiable victims of past discrimination. *United States* v. *Allegheny-Ludlum Industries, Inc.*, No. CA 74-P-0339-5 (N.D. Ala.), Memorandum Opinion filed March 21, 1978, pp. 3, 8-9.

In the aluminum and can manufacturing industries, the program was incorporated into nationwide agreements between USWA and each of the major manufacturers. The program negotiated with the aluminum companies was modeled after the decree which had been negotiated, but not yet entered, in the steel industry (App. B, pp. 42a-43a & n. 5 (Wisdom, J., dissenting)).

which is the focus of this litigation—was not simply to cure employer discrimination, but to achieve through voluntary, private collective bargaining an immediate end to a condition resulting from historic societal discrimination which the Union believed incompatible with the best interests of its entire membership: the virtually total absence of blacks, as a class, from craft jobs in plants which had large black populations employed on production jobs.

The agreement which USWA negotiated with Kaiser in 1974 covered 15 plants located throughout the United States, including the Gramercy Plant. It set as the "goal" for Gramercy (after which the quota would be discontinued) 39% minority representation in the crafts, reflecting the minority population in the area from which the plant's workforce was drawn.

Of course, the 1974 agreement would have been meaningless at Gramercy unless Kaiser simultaneously instituted a training program: absent training, there would still be no qualified blacks who could secure the benefit of the agreement. The adoption of the nationwide affirmative action program thus enabled USWA to secure a benefit for *all* employees at Gramercy which had theretofore been unattainable: Kaiser agreed to institute training programs enabling incumbent production employees to become qualified for craft vacancies. Whereas prior to 1974 none of the incumbent employees—white or black—had had any hope of becoming craftsmen, all were now given a route of access to training opportunities. The agreement provided that as between qualified blacks competing for training positions governed by the quota, plant seniority would control the order of admission, and plant seniority likewise would control the order of admission of qualified whites to the other 50% of the vacancies.

Shortly after the agreement was negotiated, Kaiser announced the first vacancies in the training program, and large numbers of incumbent white and black employees

applied for admission. Kaiser awarded half the vacancies to the most senior qualified whites who had applied, and the other half to the most senior qualified blacks who had applied. A number of whites who were not selected, including respondent Weber, had greater plant seniority than the blacks who were selected; indeed, had the vacancies been awarded solely on the basis of plant seniority, without regard to race, all would have been awarded to whites. The blacks selected were as fully qualified as the more senior whites who were not selected, as the Court of Appeals found (App. B, p. 34a). The Court of Appeals explained (App. B, p. 34a, n. 15):

> "Although ability to perform and physical fitness are factors to be considered . . . in admitting employees to on-the-job training, the amicus brief of the Equal Employment Opportunity Commission asserts that there was no evidence and no suggestion that any unsuccessful white bidder had greater ability or was more physically fit than the successful black bidders."

But the Court of Appeals' majority regarded the quotas as "meddl[ing]" with the respective employees' seniority and the "perquisites attendant upon" seniority.

The District Court Decision

The District Court ruled that, as Kaiser had not previously discriminated in filling craft positions, and as the quotas thus did not constitute a remedy for employer discrimination, they constituted "discrimination" violative of Title VII. The arguments of USWA and Kaiser that the quotas were a legitimate response to societal discrimination, which Congress had not intended to forbid when it enacted Title VII, was rejected in these terms (App. A, p. 16a):

> "Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the

> effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act."

Judgment was entered in favor of plaintiff, permanently enjoining Kaiser and USWA from denying any white employee access to the training program on the basis of race.

The Court of Appeals Decision

The majority in the court below (Judge Gee, joined by Judge Fay) affirmed. The court began by properly posing the issue:

> "[S]ection 703(j) specifies that the Act shall not require preferential treatment. But, of course, the issue here is not whether preferential treatment is required but whether it is forbidden." (App. B, p. 21a).

The court concluded that preferential treatment *is* "strictly forbidden," even where responsive to societal discrimination, "unless . . . enacted to restore employees to their rightful place within a particular employment scheme . . ." (App. B, pp. 33a-34a, 39a):

> "Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination.* For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly

> forbidden by Title VII. Not all 'but-for' consequences of racial discrimination warrant relief under Title VII.
>
> * * *
>
> We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas—and the short-term and obvious benefits must not blind us to the seeds of racial animus such affirmative relief undeniably sows—Congress has forbidden racial preferences in admission to on-the-job training programs, and under the circumstances of this case we are not empowered by the equitable doctrine of restorative justice to ignore that proscription." (Footnote omitted).

Judge Wisdom dissented, declaring that the program should be "upheld as a proper response to societal discrimination against blacks" (App. B, p. 55a). He concluded:

> "[I]n spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal." (App. B, pp. 64a-65a).

REASONS FOR GRANTING THE WRIT

I.

In *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 281, n. 8 (1976), this Court held that Title VII forbids discrimination against white male employees as well as discrimination against minorities and women, but "emphasize[d]" that it was not deciding the lawfulness of affirmative action programs:

> "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the

permissibility of such a program, whether judicially required *or otherwise prompted.*" (Emphasis added).

This petition raises in clear fashion one of the questions left open in *McDonald*: whether "an affirmative action program . . . otherwise prompted" violates Title VII. The importance of this issue is patent. The scope and intensity of the national debate on the related affirmative action issue presented in *Regents of the University of California* v. *Bakke*, — U.S. —, 46 U.S.L.W. 4896 (1978), demonstrates that the legality of such programs is at the center of our social and political consciousness.

The practical consequences of the decision below are commensurate. Affirmative action agreements—most of which parallel the one struck down in this case—negotiated by USWA alone affect nearly a million employees in major segments of the American economy. And, of course, other parties in other industries have adopted similar programs.

Nor is this an issue which can be safely left to another day. For the decision below will have an immediate *in terrorem* effect. As to facilities within the Fifth Circuit, employers and unions will be constrained at once to dismantle affirmative action programs such as that found illegal in this case—or else to face a potentially large liability in suits such as this one. Certainly, affirmative action programs of the type here will not for the present be initiated within the jurisdiction of that Circuit. With respect to facilities in other circuits, employers and unions will be left in a state of uncertainty as to whether to continue existing affirmative action programs; and, again, there will be a significant disincentive to parties considering whether to begin such programs.

These effects are not merely speculative. One major corporation has already advised USWA that in light of the decision below it has suspended implementation of the program at plants throughout the United States. Other corporations have advised USWA that they will follow suit

if certiorari is denied herein. These responses have been prompted by the flurry of "reverse discrimination" charges filed with the Equal Employment Opportunity Commission and suits which have been filed in the wake of the decision below. And even in the basic steel industry—where the programs were incorporated into a judicially-approved, industry-wide consent decree—the continuation of the program has been thrown in doubt. The consent decree court, which is in the Fifth Circuit, has issued an order to show cause why changes are not required in the decree in light of the decision below. In an accompanying memorandum, the consent decree court observed that the "essence" of the decree "is a collective bargaining agreement between the union and the companies"; that the decree was negotiated and approved without prior examination of the circumstances at each of the 250 plants to which it applies; and that in light of the decision below there is serious doubt that the craft goals in the consent decree are lawful at those plants where the underrepresentation of minorities in the crafts was not the product of employer discrimination. *United States* v. *Allegheny Ludlum Industries, Inc.*, No. CA 74-P-0339-5 (N.D. Ala.), Memorandum Opinion filed Mar. 21, 1978, at 3, 8-9.

With consequences of this nature, the decision of this issue should not be put off to some later date.

II.

The question presented here was not resolved in *Bakke*. The conduct there alleged to be unlawful discrimination was that of the University of California—a state governmental entity. Racial discrimination by such institutions has of course been subject to constitutional proscription since the ratification of the Fourteenth Amendment. Title VI of the Civil Rights Act of 1964 reinforced that constitutional proscription, at least with an additional remedy, where the federal interest is compounded by the grant of federal funds.

By contrast, the instant case involves actions taken by purely private parties—parties not subject to any constitutional proscription against discrimination. The affirmative action program here at issue is unlawful only if it violates Title VII. The question then becomes whether the Congress of 1964, in passing that Title of the Civil Rights Act, intended for the first time to outlaw efforts by private parties to provide special opportunities to minority groups in response to the effects of historic societal discrimination upon the parties' workforce. This question is exclusively one of statutory interpretation, and must be resolved in the light of the distinct statutory language, history and purpose of Title VII. For the reasons already stated, after 15 years of uncertainty the task of answering that unsettled question should begin.[6]

[6] This Court has granted certiorari in *County of Los Angeles* v. *Davis*, No. 77-1553, *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3780 (June 19, 1978). Because one of the issues in that case relates to the validity of a court-ordered quota remedy, we point out here that *Davis* does not raise the issue sought to be raised in the instant petition. At the threshold, of course, the remedy challenged in *Davis* is founded primarily, if not entirely, on 42 U.S.C. § 1981, not on Title VII; the challenge raised in the *Davis* petition is not so much to the propriety of quota relief as such but to the permissibility of that relief for "violations" which were not timely adjudicated by appropriate plaintiffs; and there are numerous questions in that case as to whether liability was properly found which might obviate the need to reach any issue of remedy. More fundamental, however, is that any quota issue which could be raised in *Davis* would be by nature distinct from the issue raised here. There, racial quotas were imposed by a court upon nonconsenting private parties as a "remedy" for such parties' past unlawful discrimination. In a Title VII case (or, we submit, in a § 1981 case), justification of such judicial imposition of racial quotas must overcome (1) the proscription of section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), against the governmental requirement of racial preferences to overcome underrepresentation of minorities *and* (2) the logic of this Court's prior decisions prescribing individualized "rightful place" remedies as the appropriate cure for Title VII violations. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 737 (1976); *Teamsters* v. *United States*, 431 U.S. 342, 362-376 (1977). In contrast, this case involves not the question of the propriety of governmental imposition of quotas, but the legality of the voluntary adoption of quotas by private parties in response to the effects upon their workforce of historic societal discrimination. The barriers of § 703(j) and this Court's prior decisions in *Franks* and *Teamsters* are not present here. Resolution of the issue in *Davis* will not control the outcome of this case.

CONCLUSION

USWA has embarked upon a nationwide program which, if allowed to continue, will soon produce a major alteration in the status of blacks in important segments of American industry. In a very few years, this nation will see a new generation of many thousands of fully trained black craftsmen. This is not a result which government has commanded (or perhaps could command), but it is a result which private, voluntary collective bargaining can produce. The court below has declared that Title VII forbids this program. It is imperative that this Court grant certiorari and decide whether that result is what Congress intended.

Respectfully submitted,

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APPENDIX A

United States District Court

EASTERN DISTRICT OF LOUISIANA

Civil Action No. 74-3510

Section "I"

BRIAN F. WEBER, Individually and on Behalf of all other persons similarly situated

versus

KAISER ALUMINUM & CHEMICAL CORP. and
UNITED STEELWORKERS OF AMERICA AFL-CIO

(Entered June 27, 1976)

GORDON, J., District Judge:

This civil action seeks relief from the effects of alleged illegal discriminatory employment practices by Kaiser Aluminum & Chemical Corporation (hereinafter referred to as "Kaiser"). A trial was scheduled on plaintiffs' request for a preliminary injunction; however, by stipulation of all of the parties the trial was conducted on the merits of plaintiffs' request for a permanent injunction. This opinion, therefore, relates solely to plaintiffs' prayer for injunctive relief against provisions incorporated by Kaiser in its current collective bargaining agreement, as such provisions pertain to Kaiser's employment practices at its plant located at Gramercy, Louisiana. Plaintiffs contend that these provisions establish a quota system which illegally discriminates against non-minority members of the Kaiser Gramercy labor force in violation of Title VII of the Civil Rights Act of 1964.

Brian F. Weber, the individual plaintiff and class representative, has been an employee for Kaiser for approximately seven years, and is presently working as a laboratory analyst at Kaiser's plant in Gramercy. It appears that Mr. Weber has assumed an active role in the plant's employee-employer relationship inasmuch as he has recently become the chairman of the plant's grievance committee and has also served as a member of the negotiating committee, formed to supply a local supplement to the 1974 Master Labor Agreement, details of which will be discussed later. The plaint' also is an active member of the United Steelworkers of America Labor Union, AFL-CIO, Local 5702.

In addition to presenting his own claim, Mr. Weber is serving as representative of a class of workers who have similar grievances. This class has been previously defined to include the following employees:

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974."

Accordingly, the plaintiffs herein consist of Mr. Brian Weber and the class of employees as described above.

The defendants are Kaiser Aluminum & Chemical Corporation, a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of California, and the United Steelworkers of America AFL-CIO (hereinafter referred to as USWA). The USWA is a labor organization created to champion the rights of its members and to bring to bear greater influence upon management during labor negotiations. In the instant case, the USWA is the certified representative of the employees of Kaiser at the Gramercy, Louisiana plant.

On February 1, 1974, Kaiser and USWA entered into an agreement called the "1974 Labor Agreement," which specified hourly wages, hours of work, and conditions of employment. Of particular significance here are the provisions of this collective bargaining agreement relative to minority representation in the trade, craft and assigned maintenance classifications. The pertinent portions of the contract provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:
>
> [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates...
>
> • • • •
>
> The term "minority" as used herein shall be as defined in EEOC Reporting Requirements.
>
> (See: Joint Exhibit #1, "1974 Labor Agreement," pp. 164-165.)

These portions of the contract are found in an addendum to Article 9 thereof, which Article deals with "Seniority." The "Joint Committee" thereafter entered into a "Memorandum of Understanding"[1] which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each "craft family" at the Kaiser Gramercy plant.[2]

---

[1] Joint Exhibit # 2.

[2] Joint Exhibit # 2, p. 8, and Exhibit B thereto.

In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician,* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.

In October, 1974, Kaiser posted additional bids for on-the-job training opportunities, this time in the category of *insulator* and *carpenter.* According to Mr. Weber's testimony, the vacancy in the insulator category was filled by a black employee, since the bid was restricted to blacks only. In the category of carpenter, one black and one white were selected.

It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Kaiser operates many plants throughout the country, but for the purposes of this litigation, we are only concerned with the Labor Agreement as it affects employment practices at the plant located in Gramercy, Louisiana. Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent par-

ishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. It was also established by the testimony of Mr. English that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.

With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen.

Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford

more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U.S. Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations. The plaintiffs here contend that as the quota system affects the Gramercy plant it unlawfully prefers black employees who have never been subject to prior discrimination by Kaiser.

The defendants' initial contention is that seniority rights are derived from collective bagaining agreements, and, thus, are contractual rights which are not properly the subject of Title VII of the Civil Rights Act of 1964.

This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive collective bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. *Ferrara* v. *Pacific Intermountain Express Company,* 301 F.Supp. 1240 (N.D. Illinois, E.D. 1969); *Schick* v. *N.L.R.B.,* 409 F.2d 395 (7th Cir. 1969).

On the other hand, a union or company cannot lawfully bargain for the establishment or confirmation of unlawful discriminatory practices. *Emporium Capwell Co.* v. *Western Addition Community Organization,* ..... U.S. ....., 95 S.Ct. 977, ... L.Ed.2d ..... (Feb. 1975).

Because the plaintiffs contend that the collective bargaining agreement establishes a quota system which is in violation of the Civil Rights Act of 1964, this Court has the authority and jurisdiction to consider their claims even though the quota system was the product of a labor-management agreement.

In its consideration of Plaintiffs' claims under the 1964 Civil Rights Act, this Court will be concerned only with Title VII of such Act which made the elimination of employment discrimination based on race, color, religion, sex or national origin in all industries affecting interstate commerce an avowed objective of the Federal Government. This endeavor is reflected in Section 703(a) of Title VII [42 U.S.C. 2000(e)-2(a)], which reads:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Discrimination against any individual on the basis of race in any apprenticeship or training program is also specifically prohibited by Section 703(d) [42 U.S.C. 2000(e) (2) (d)], which provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual be-

cause of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

During the lengthy debates which preceded this legislation, many employers and legislators expressed fear that the equal employment provisions of the 1964 Civil Rights Act would be construed to require the hiring of minority group personnel on the basis of quotas in order to rectify existing imbalances in employment. To placate these concerns, Section 703(j) [3] was placed in the Act as a compromise, so as to clarify that the equal employment provisions of the 1964 Act were not intended by the Congress to require that preferential treatment be given any individual or group because of an imbalance that might exist with respect to the total number or percentage of persons of any race, color, religion or sex employed in comparison with the total number or percentage of such persons in that area. See generally, *The Civil Rights Act of 1964,* ENA Operations Manual (1964).

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[3] Section 703(j), 42 U.S.C. § 2000(e)-(2)(j), reads:

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In this case Kaiser asserts support for the discrimination against its white employees brought about by its aforesaid affirmative action program in the fact that Section 703(j), while providing that the equal employment provisions of the 1964 Act were not to be interpreted as requiring quotas, does not, within the four corners of that subsection, prohibit quotas in employment or training programs.

After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in Sections 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many consider the salutory or benign discriminations of such programs from its sweeping prohibitions against racial discrimination by an employer against an individual.

Kaiser further seeks to justify the racially discriminatory effects of the quota system which it has adopted by analogizing its affirmative action program to those mandated by United States Courts in response to lawsuits brought by minority group employees under the provisions of Title VII of the Civil Rights Act. It would be well, therefore, briefly to review the history of such court involvement.

After the effective date of the 1964 Act, the courts were deluged with cases alleging employment discrimination, and were left to impose relief commensurate with the nature of the violation. In *Louisiana* v. *United States,* 225 F.Supp. 353, 393, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709

(1965) the Supreme Court for the first time considered the scope of authority of the judiciary to fashion such relief. Its conclusion was that the courts had not only the power but the duty to render decrees which would "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States, supra,* at 380 U.S. 154.

The lower courts thereafter began exercising this authority realizing that in some cases affirmative action programs were necessary to effectuate the purpose of the 1964 Act. For example, in the case of *Local 53 of Int. Ass'n. of Heat & Frost Insulators & Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969), the Court explained:

> "In formulating relief from such practices the Courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' United States v. La., E.D. La. 1963, 225 F.Supp. 353, 393, aff'd 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at p. 1052.

Additionally, the Court said in *Volger*:

> "Where necessary to ensure compliance with the Act, the district court was fully empowered to eliminate the present effects of past discrimination. United States v. Local 189, United Papermakers & Paper Workers, E.D. La. 1968, 282 F.Supp. 39, 45; Quarles v. Philip Morris, Inc., E.D. Va. 1968, 279 F.Supp. 505, 516. See also, Louisiana v. U.S. 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at pp. 1052, 1053.

cf. United States v. *United Bro. of Carpenters & Joiners of America, Local 169,* 457 F.2d 210 (7th Cir. 1972).

As in the *Vogler* case, the courts most frequently exercised their authority to fashion affirmative relief in cases where the employment scheme in question was found to be neutral on its face, but had the effect of perpetuating the

effects of past discrimination. See *United States v. Wood, Wire and Metal Lath. Int.* v. *Loc. No. 46,* 471 F2d 408 (2d Cir. 1973); *United States* v. *Central Motor Lines, Inc.,* 325 F. Supp. 478 (W.D.N.C. 1970); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, 92 S. Ct. 447, 30 L.Ed.2d 367 (1971).[4]

As the courts began to impose quota systems and other affirmative action programs on a case-by-case basis, however, many employers contested such authority arguing that Sec. 703(j) of the Civil Rights Act prohibited anyone from granting preferential treatment to a given class.

In the case of *United States* v. *International Bro. of Electric Workers Local No. 38,* 428 F.2d 144 (6th Cir. 1960), the Court explains the seemingly incongruent relationship between affirmative relief and preferential treatment thusly:

> "When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000(e)-(2)(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices." *Int'l Bro. of Electrical Workers, supra,* at p. 149.

Accordingly, from the principles espoused in *Louisiana* v. *United States, supra,* and its progeny, it is well established that the judiciary may establish affirmative action programs as a form of relief in certain Title VII cases without running afoul of sections 703(a), 703(d) or 703(j) of the 1964 Act.

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[4] See also, *United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46,* 471 F.2d 408 (2d Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed. 2d 338 (1972); *Contractors Association of Eastern Pennsylvania* v. *Sec. of Labor,* 442 F.2d 159, 173 n. 43 (3d Cir. 1970), cert. denied 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed. 2d 95 (1971).

At first blush, it might appear inconsistent that the Act on one hand makes unlawful the establishment by employers of affirmative action programs, while on the other hand permits, if not requires, the courts to fashion similar relief in certain cases. Upon reflection, however, substantial distinctions become apparent.

The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

There are other logical and compelling reasons for distinction between employer action and court action. First, because relief of this nature should be imposed with extreme caution and discretion, and only in those limited cases where necessary to cure the ill effects of past discrimination, the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. Further, the administration of such relief by the courts tends to assure that those remedial programs will be uniform in nature and will exist only as long as necessary to effectuate the purposes of the Civil Rights Act.

Even though the courts may establish affirmative action relief, they have been reluctant to impose quota systems like that in question here, for they recognize that such programs are at best inequitable. In a very recent case, *Kirkland* v. *New York*, 520 F.2d 420 (2d Cir. 1975), the court made the following observation:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." *Kirkland, supra* at p. 429.

Thus, the courts are cognizant of the undesirable effects accompanying quota systems, and, accordingly, have established such systems only in factually limited circumstances. For example, the courts in recent decisions have refused the invitation to impose such affirmative action plans without first being convinced that those seeking relief have themselves been the subject of past discrimination. In the case of *Watkins* v. *United Steel Workers of Am., Local No. 2369*, 516 F.2d 41 (5th Cir. 1975), the Fifth Circuit Court of Appeals held that even though the use of a seniority system to lay off employees may result in the discharge of more blacks than whites, the discharge system was not discriminatory where the individuals who suffered the layoffs were in their "rightful place"[5] since they had never personally experienced prior employment discrimination.

The Court in *Watkins* said, "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites." *Watkins, supra*, at p. 50.

In another very recent case, *Chance* v. *Board of Examiners of the Board of Education of the City of New York*, 44 L.W. 2243-2344, — F.2d — (2d Cir. 1976), the Court analyzed the imposition of a quota system the effect of which was to require a senior, more experienced white employee to stand aside and forego the seniority benefits guaranteed him by the New York Education Law, solely because a younger, less experienced employee was black.

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[5] For a full discussion of the "rightful place" theory see *United States* v. *Local 189, United Papermakers & Paperworkers*, 282 F.Supp. 39 (E.D. La. 1968) aff'd 416 F.2d 980 (5th Cir. 1969).

The *Chance* case was a civil rights class action which began in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City School System. The United States District Court for the Southern District of New York directed the Board of Education of the City of New York to excess supervisory personnel in accordance with a formula imposing racial quotas upon the excessive process. Excessing rules are very similar to the principles of seniority inasmuch as excessing rules provide, in brief, that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. As the Court of Appeals recognized, the inevitable consequences of the racial quotas preventing the excessing of a black or Puerto Rican are that a white person with greater seniority must be excessed in his place. In reversing the Disrict Court's decision, the Second Circuit explained:

> "Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII, and they are in accord that this Act was not intended to invalidate bona fide seniority systems. Waters, supra, 502 F.2d at 1318; Jersey Central, supra, 508 F.2d at 710. Our brothers in the Fifth Circuit say that 'regardless of what that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.' " *Chance supra,* at 6594.

The Court further stated that if a minority worker had been kept from his "rightful place" on the seniority lists by the use of discriminatory examinations, or other discriminatory practices, he may in some instances, be entitled to preferential treatment. Reasoning, however, that such

preferential treatment should be given not because the man is black, but because he had been discriminated against, the Court observed:

> "The 'freedom now' and 'rightful place' doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. Local 189, United Papermakers v. United States, supra, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the later involves only the filling of vacancies. We have followed the 'rightful place' doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971)." *Chance, supra,* at 6597.

Since the evidence received during the trial of the case sub judice established that the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their "rightful place" in the plant. Accordingly, a plant-wide seniority system at Kaiser's Gramercy plant would have adequately ensured that its minority employees were receiving those benefits commensurate with their seniority. Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority. Thus, applying the rationale developed in *Watkins* and *Chance* to the facts of this case, the Court must conclude that an affirmative action quota system such as that imposed by Kaiser would have been inappropriate for the Gramercy plant, even if defendants were correct in their contention that employers have some right to discriminate by analogy to those cases where courts have ordered affirmative relief programs.

In reaching its conclusion that the discriminatory provisions of Kaiser's affirmative action program violate specific proscriptions of Title VII of the 1964 Civil Rights Act, this Court is well aware that similar programs have been adopted, before and after enactment of the 1964 Act, by many employers in the private and public sector, often because of pressure from various agencies of the Executive Branch of the United States Government. Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the 1964 Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary. Numerous policy decisions of monumental importance to the nation necessarily would have to be made in creating exceptions to Sections 703(a) and (d) of the 1964 Act, and the type of Congressional scrutiny and public debate such as that reflected in the legislative history of the 1964 Act would ensure

that competing interests could be balanced in a fashion consistent with the democratic processes pursuant to which the 1964 Act itself was adopted.

Accordingly, judgment will be entered in favor of plaintiffs, and against defendants, granting a permanent injunction restraining defendants from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race.

New Orleans, Louisiana, this 17 day of June, 1976.

S/JACK M. GORDON
United States District Judge

APPENDIX B

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Defendants-Appellants

No. 76-3266

United States Court of Appeals, Fifth Circuit

Nov. 17, 1977

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In February 1974, Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement with United Steelworkers of America, AFL-CIO (USWA), that significantly altered eligibility for on-the-job training to enter craft positions in all Kaiser plants. In an effort to increase the number of minority workers in the craft families, the 1974 Labor Agreement removed the requirement of prior craft experience for on-the-job training and established an entrance ratio of one minority worker to one white worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the area surrounding each plant. Eligibility for training still rested on plant seniority, but to implement their affirmative action goal it was necessary to establish dual seniority lists: for each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective

racial groups.[1] As predictable, black employees have been admitted to Kaiser's on-the-job training program with less seniority than their white competitors. One unsuccessful white bidder working at Kaiser's Gramercy, Louisiana, plant brought this class action on behalf of all persons employed by Kaiser at its Gramercy works who are members of the USWA Local 5702, who are not members of a minority group and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974. Mr. Weber alleged that by preferring black employees with less seniority for admission to on-the-job training, Kaiser and USWA were guilty of unlawful discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2 et seq. (1970). The district court agreed and granted a permanent injunction against further use of the 1974 training eligibility quota. Although the 1974 Labor Agreement applies to all Kaiser plants and similar agreements were enacted through the aluminum industry, these facts pertain only to Kaiser's plant in Gramercy, Louisiana, and this action enjoined the use of the quota at that plant only. Kaiser and USWA, supported by numerous amici curiae,[2] bring this appeal asking us to hold that their training quota, which they say is mandated by valid executive action, does not violate Title VII and is justified by past societal discrimination even in the absence of past employment discrimination here.

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[1] The dual lists were maintained solely for eligibility to on-the-job training, and all other seniority benefits were conferred without regard to race.

[2] Amicus briefs on behalf of Kaiser and USWA were filed by Reynolds Metal Company, the United States and the Equal Employment Opportunity Commission, and Aluminum Company of America (ALCOA). The Southeastern Legal Foundation and the Anti-Defamation League of B'nai B'rith filed amicus briefs supporting appellee Weber.

Affirmative Relief or Reverse Discrimination?

The case before this court today is unique in that the affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with the threats of the Office of Federal Contract Compliance Programs (OFCC) conditioning federal contracts on appropriate affirmative action.[3] The case is also unique in that it presents a conflict between affirmative action dictated by the OFCC under Executive Order 11246 and preferential treatment prohibited by Title VII. In *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), Title VII and Executive Order 11246 dictated the *same* response to massive discriminatory practices throughout the steel industry, but the training quota adopted by Kaiser in response to Executive Order 11246 is flatly and literally prohibited by Title VII, § 703(d), which makes it unlawful to limit access to on-the-job training on the basis of race:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin

[3] Executive Order No. 11246 requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202(j), 3 C.F.R. 169 1974), reprinted following 42 U.S.C. § 2000e (1970). The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. *See* 41 C.F.R. 60-20.1 et seq.; 41 C.F.R. 60-2.24.

> in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d)(1970). Additionally, section 703(a) prohibits racial classifications in general,[4] and section 703(j) specifies that the Act shall not require preferential treatment.[5] But, of course, the issue here is not whether preferential treatment is required but whether it is forbidden.

[4] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

[5] (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970).

When does preferential treatment become illegal reverse discrimination? The answer depends on the law involved, the nature of the affirmative action, and the factual circumstances of the prior discrimination.[6] Federal courts have agreed that the "make whole" objective of Title VII[7] permits and even requires affirmative relief when necessary to correct continuing inequalities created by past discriminatory employment practices.[8] In *Franks* v. *Bowman*

[6] *See United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d (1977) (does redistricting to assure a black majority illegally dilute the voting strength of Hasidic Jews?); *Franks* v. *Bowman Trans. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (does the grant of fictional seniority to identifiable victims of employment discrimination illegally discriminate against the seniority rights of nonminority employees?). *Bakke* v. *Regents of University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977) (does reservation of a certain number of "black" places in the entering class of a state medical school impermissibly discriminate against better-qualified white students who would have been admitted but for the racial quota?); *Chance* v. *Board of Examiners and Board of Education of New York*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977) (does a quota which requires the percentage of black and Puerto Rican supervisors to reflect the surrounding population discriminate by forcing the dismissal of whites with greater seniority?).

[7] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

[8] This duty is analogous to the equitable duty to eliminate the continuing effects of past discrimination in voting rights. *United Jewish Org. of Williamsburgh, Inc.* v. *Carey, supra; Louisiana* v. *United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), or to the courts' equitable power to correct continued inequities resulting from intentional segregation of schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971).

Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the Court seems to have adopted this circuit's "rightful-place" doctrine,[9] authorizing fictional seniority in order to place the victims of discrimination in as good a place as they would have enjoyed absent discriminatory hiring practices.

> Obviously merely to require [respondent] to hire the class three victim of discrimination falls far short of a "make whole" remedy. A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors. [footnotes omitted].

Id., 424 U.S. at 767-68, 96 S.Ct. at 1265-1266. The Court made it clear that an award of artificial seniority may not be denied on the ground that it conflicts with the economic interests of other employees.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in in-

[9] For a discussion of the "rightful-place" doctrine, *see Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

> stances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination....

Id. at 774, 96 S.Ct. at 1269.

The Supreme Court has never approved the use of a quota remedy to overcome employment discrimination, but circuit courts have repeatedly sanctioned judicially imposed quotas in certain factual circumstances. Prior to the 1972 amendments to Title VII, our circuit approved such a quota. *Local 53, International Ass'n of Heat & Frost Insulators & Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). *Accord, United States* v. *International Brotherhood of Electrical Workers, Local 38,* 428 F.2d 144, 149-59 (6th Cir.), *cert, denied,* 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States* v. *Sheetmetal Workers Local 36,* 416 F.2d 123 (8th Cir. 1969). In 1972, a Senate amendment to overturn this case law and forbid the use of quota remedies was rejected two-to-one. Legislative History of Equal Employment Opportunity Act of 1972 at 1017, 1042-74, 1081, 1714-17 (1972). The bill amending Title VII in 1972 provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcom. on Labor of the Senate Com. on Labor and Public Welfare, Legislative History, *supra* at 1844. Since 1972, judicially imposed quota remedies have been widely approved. *United States* v. *International Union of Elevator Constructors Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *Boston NAACP*

v. *Beecher,* 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios* v. *Enterprise Association Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974); *NAACP* v. *Allen,* 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *United States* v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973); *Pennsylvania* v. *O'Neill,* 473 F.2d 1029 (3d Cir. 1973) (en banc); *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir.) (en banc), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). But our courts have not been unaware of the dangers of granting preferential treatment on the basis of race:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where compelling need for remedial action can be shown. *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity. [footnotes omitted].

Associated General Contractors of Massachusetts, Inc. v. *Altshuler,* 490 F.2d 9, 17-18 (1st Cir. 1973). Three circuits have refused to approve racial quotas when the factual cir-

cumstances of the past or present discrimination did not dictate such an extraordinary remedy. *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Chance* v. *Board of Examiners, supra; Watkins* v. *United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Title VII and Executive Order 11246

Quotas imposed to achieve the "make whole" objective of Title VII rest on a presumption of some prior discrimination. There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their "rightful place" in the employment scheme. Several circuits have noted this distinction, holding that quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not. *United States* v. *Wood, Wire & Metal Lath. International Union Local 46*, 471 F.2d 408, 413 (2d Cir. 1973); *Carter* v. *Gallagher, supra* at 329; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 173 n.47 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States* v. *International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Local 53, International Association of Heat & Frost I. & A. Workers* v. *Vogler, supra* at 1052. *But see EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977); and *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra* (Executive Order 11246 may provide an alternative justification for racial quotas totally apart from any violation of Title VII).

Courts also have affirmed quota remedies imposed by federal affirmative action programs under the impetus of

Executive Order 11246 and comparable state affirmative action programs. *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra; Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra* (the Philadelphia Plan); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (1970) (the Cleveland Plan); *Joyce* v. *McCrane*, 320 F.Supp. 1284 (D.N.J.1970) (the Newark Plan); *Southern Illinois Builders Association* v. *Ogilvie, supra* (the Illinois-Ogilvie Plan). The affirmative action program mandated by 41 C.F.R. § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority and female representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist. The regulation then confuses things mightily by declaring that a goal shall not be considered a device for instituting quotas or reverse discrimination:

> [T]he purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

41 C.F.R. § 60-2.30. Attempts to distinguish a numerical goal from a quota have proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas.[10]

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[10] While serving in the Labor Department, I helped devise minority employment goals for government contractors.

I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we wished to avoid.

Silberman, *The Road to Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12, col. 4.

We must judge the legality of Kaiser's training ratio in light of both Title VII, with its "make-whole" objective, and Executive Order 11246, with its mandate for affirmative action that does not itself discriminate.

1974 Labor Agreement

Petitioner Weber complains of Kaiser's dual seniority system that permits black employees to be admitted to on-the-job training programs ahead of white employees with greater seniority. The offending portions of the 1974 Labor Agreement provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the plants set forth below, and, where necessary, establish certain goals and timetables in order to achieve a desired minority ratio: [Gramercy works listed, among others].
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . .

1974 Labor Agreement, Addendum to Art. 9 dealing with seniority. The Joint Committee entered into a Memorandum of Understanding which established a goal of 39% minority representation in each craft family at the Kaiser Gramercy plant.[11]

[11] Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups.

Weber v. *Kaiser Aluminum Corp.*, 415 F.Supp. 761, 764 (E.D.La. 1976).

The one-for-one ratio was then implemented to accomplish this goal.

> In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.
>
> • • • • • •
>
> It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Weber v. *Kaiser Aluminum Corp.*, 415 F.Supp. 761, 764 (E.D.La.1976).

It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race. In *McDonald* v. *Santa Fe Trails Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court held that Title VII prohibits racial discrimination against white employees upon the same standards as would be

applicable were they Negroes. 427 U.S. at 278-282, 96 S.Ct. at 2577-2578, 49 L.Ed.2d at 500-01. *Accord Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (Title VII prohibits preferences for any groups, minority or majority.

The district court granted injunctive relief against the complained-of quota system on two grounds:

> (1) Courts may establish affirmative action programs as a form of relief in Title VII cases, but when an employer and a union voluntarily adopt a quota system this violates Title VII.[12] Quota systems must be imposed with great caution, and *only the judiciary* should be entrusted with fashioning and administering such relief.
>
> (2) Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

We disagree with the district court's reasoning that what courts may force upon employers in the name of Title VII employers and unions may not voluntarily institute. In *United States* v. *Allegheny-Ludlum Industries, Inc., supra,* which dealt with consent decrees eliminating patterns and practices of discrimination in the steel industry, this court emphasized that voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII. *See also Pettway* v. *American Cast Iron Pipe Co.,*

[12] The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employers by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

415 F. Supp. at 767.

494 F.2d 211, 258 (5th Cir. 1974); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970); *Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969); *Oatis* v. *Crown Zellerbach*, 398 F.2d 496, 498 (5th Cir. 1968). But there is strong authority to support the position that courts are not subject to the same restrictions as employers. Section 703, which defines unlawful employment practices, does not limit judicial remedies which are governed by the broad language of section 706(g) authorizing "such affirmative action as may be appropriate."

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§ 703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies.

United States v. *International Union of Elevator Constructors Local 5, supra* at 1019. In *Franks* v. *Bowman Transportation Co., supra,* the Supreme Court affirmed this view that the definitional section 703(h) does not limit relief otherwise appropriate under section 706(g). We need not now probe into the distinctions between court-ordered remedies and permissible remedies voluntarily hammered out in collective bargaining agreements because we affirm the district court's opinion on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed.

No Prior Discrimination

The district court found, and appellants all but concede,[13]

[13] Appellants argued that because prior craft experience was formerly required for admittance to on-the-job training and because minorities lacked such experience due to the discriminatory nature of craft unions, indeed there had been some prior discrimina-

that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant:

> It was also established by the testimony of Mr. English [Kaiser's industrial relations superintendent at its Gramercy plant] that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that *Kaiser had a nondiscrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.*
>
> With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. *Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community.* Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen. (emphasis added).

tion at the Gramercy plant. But only 28 employees were elevated to craft positions through this training program in the ten years prior to 1974; two of these were black. We conclude that this program was so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period. That only three black craft workers were hired from outside the plant reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser.

415 F.Supp. at 764. In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment "not because he is Black, but because, and only to the extent that, he has been discriminated against." *Chance* v. *Board of Examiners, supra* at 999. If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the face that they began that way.

Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training

[14] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

blamed on past *societal discrimination*. For surely it is common knowledge that many blacks (and others) have suffered arbitary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title VII. *Cf. Local 189, United Papermakers & Paperworkers* v. *United States, supra* at 988. Finding no victims of employment discrimination, the Eighth Circuit reversed a racial hiring quota designed to favor less qualified minority applicants over more qualified white applicants:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

Carter v. *Gallagher, supra* at 325. Here we do not deal with minority workers less qualified as to skills;[15] presumably each employee seeking admittance to on-the-job training is unskilled for the craft position he or she seeks. Rather, we are confronted with white employees who are more senior than selected black trainees. As noted at the outset, these dual seniority lists, one for black employees and one for

[15] Although ability to perform and physical fitness are factors to be considered in addition to seniority in admitting employees to on-the-job training, the amicus brief of the Equal Employment Opportunity Commission asserts that there was no evidence and no suggestion that any unsuccessful white bidder had greater ability or was more physically fit than the successful black bidders.

white employees, are maintained only for purposes of selecting on-the-job trainees and do not reflect preferential treatment in layoff, recall, transfer assignments, working conditions or any other benefit. But the importance of seniority principles in allocating scarce opportunities such as training for advancement cannot be overlooked.[16] And because we deal here solely with an effect of seniority, it is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at the larger universe of all Kaiser operations or indeed about society at large. Seniority is acquired at the plant and operates on a basis neither larger nor smaller than the plant. Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other. Here, unlike in *Franks* v. *Bowman Transportation Co., supra,* there has been no discriminatory refusal to hire and therefore, here, there is no occasion to restore any employee to his rightful place. *Accord Watkins*

[16] Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy & E. Livermash, The Impact of Collective Bargaining on Management, 104-115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance and one of its major functions is to determine who gets or who keeps an available job." *Humphrey* v. *Moore,* 375 U.S. 335, 346-347, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Franks v. *Bowman Transp. Co.,* 424 U.S. at 765, 96 S.Ct. at 1265.

v. *United Steelworkers of America Local 2369,* 516 F.2d 41 (5th Cir. 1975) (a last-hired, first-fired seniority system resulting in the layoff of more black than whites is not discriminatory where the individuals who suffered the layoffs were in their rightful place and had never personally experienced prior employment discrimination); *Chance* v. *Board of Examiners, supra* (a last-hired, first-fired layoff plan which has never been discriminatory may not be suspended to permit black or Puerto Rican supervisors to keep their jobs in preference to a white supervisor with greater seniority). Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII. We concur in the district court's opinion that however laudable the objective of training minority workers, Title VII clearly proscribes discriminating against majority workers:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocable prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

415 F.Supp. at 769 (original emphasis).

Executive Order 11246

Appellants contend that if this racial quota is not sanctioned by Title VII it is sanctioned by Executive Order 11246 and regulations issued by the Office of Federal Contract Compliance (OFCC) mandating affirmative action by all government contractors. Indeed, the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts.

Appellees respond that because Kaiser has actively recruited black craft workers it has complied with the executive requirement of affirmative action and is not guilty of "underutilization." They argue that, properly interpreted, Executive Order 11246 would not require a racial quota in these circumstances and that the OFCC improperly threatened the withdrawal of all federal contracts unless this racial preference was enacted.

Executive Order 11246, with its implied mandate for affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra* at 166-71 (upholding the "Philadelphia Plan"); *see also Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629 (5th Cir.), *cert. denied,* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). But executive orders may not override contradictory congressional expressions. In the famous challenge to executive power in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson divided executive orders into three categories: (1) those in which the President acts pursuant to express or implied authorization by Congress, as to which his authority is at a maximum; (2) those in which the President acts in the absence

of congressional grant of authority and must rely upon his own independent powers; and (3) those in which executive action conflicts with the express or implied will of Congress and is most vulnerable to challenge.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [footnotes omitted].

343 U.S. at 638, 72 S.Ct. at 871. The Third Circuit first validated the Philadelphia Plan as valid executive action and then tested it for conflicts with congressional action, holding that "the Executive is bound by the express prohibitions of Title VII." 442 F.2d at 171-72. The Third Circuit held that the general prohibition against discrimination found in sections 703(a), (h) and (j) did not prohibit the affirmative action imposed by the Philadelphia Plan, *given a finding of prior exclusionary practices* by the six trade unions controlling the work force.

Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall before this direct congressional prohibition.

We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas—and the short-term and obvious benefits must not blind us to the seeds of racial animus such affirmative relief undeniably sows [17]—Congress has forbidden racial preferences in admission to on-the-job training programs, and under the circumstances of this case we are not empowered by the equitable doctrine of restorative justice to ignore that proscription.

Affirmed.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

Today the Court grapples with the question whether, in a collective bargaining agreement, recognition of race for remedial purposes in employment practices is legal "affirmative action" or illegal "reverse discrimination". The majority does not assert race may never be considered in employment practices or in other racially tense areas. Over ten years ago this Court declared, "The Constitution is both

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[17] Racial quotas also have been criticized for contributing to the Balkanization of this country by fostering "the dangerous notion that ethnic, racial or religious groups are entitled to proportional representation in all occupations."

In hindsight, one can see this was predictable. We wished to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice.

Silberman, supra at col. 5.

color blind and color conscious".[1] Where I differ from the majority is in my assessment of situations justifying reliance on race as a basis for decision-making. Here, the decision-making was by agreement between management and the union, presumably with the blessing of the legislative and executive branches of government but without benefit of the judicial branch. "Management and the government have been our [the unions'] partners in these endeavors [to eliminate discriminatory employment practices] and a great deal of credit must be given to them for the accomplishments of the past ten years." Bredhoff, Affirmative Action in a Declining Economy: Seniority and Incumbent Majority, in Federal Bar Association, An Equal Employment Opportunity Practice Guide, 118, 119 (1977). The third party beneficiaries of these joint endeavors and agreements are the disadvantaged minorities.

There are three independent legal justifications for these defendants' actions. I must therefore dissent.

I.

The majority accurately and completely presents the facts of this case. A look at the facts from a different point of view, however, is needed to put the defendants' actions in the proper perspective.

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[1] *United States* v. *Jefferson County School Board*, 5 Cir. 1966, 372 F.2d 836, 876, *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed. 2d 103. Continuing, we said: "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." 380 F.2d at 385.

This action was brought by a white worker at the Kaiser Aluminum and Chemical Corporation [Kaiser] plant in Gramercy. Gramercy, a town with a population of about 2000, is in St James Parish., Louisiana, about fifty miles northwest of New Orleans. The Gramercy plant was opened by Kaiser in 1958. Workers at that plant, as in other Kaiser plants, are represented by the United Steelworkers of America [the Union]. St. James and the adjacent parishes had a minority population of about 43 percent at the time of trial. The workforce in those parishes was estimated at 39 percent black.[2] At the time of trial the Kaiser workforce at Gramercy was 14.8 percent black. This was a sharp increase from 1969, when, under federal government pressure, Kaiser began hiring at the gate on a one-to-one black to white ratio. At that time the Kaiser workforce was approximately 10 percent black.[3] Before 1969 the plant had hired unskilled labor at the gate by choosing "the most qualified". There was evidence at the trial from two Kaiser personnel officials that Kaiser had never discriminated by race at its Gramercy plant.

After the 1969 action, Kaiser was still concerned about the low percentage of black craftsmen at its plant. Prior to 1974 only five of the approximately 290 craftsmen at the

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[2] The plan in question applied to blacks, other minority groups, and women. However, at Gramercy its application thus far has involved only blacks. For convenience, I use the term "blacks" both in the specific Gramercy situation and in other situations, when a more complete statement would include the other affected groups.

[3] The record shows that the Gramercy plant has experienced an increase in black employment of about one percent of their total workforce per year since 1969. Although there was no direct evidence about the percentage of black employees in 1969, extrapolation from those figures produces an estimate that about 10 percent of the Kaiser workforce at Gramercy was black in 1969. Appendix at 123-24, 129-30, 137.

plant were black. The company made strenuous but unsuccessful efforts to attract more black craftsmen. Pressure from the federal government continued, not just at the Gramercy plant but nationally. Kaiser and the Union discussed the problem in negotiations leading to their 1974 collective bargaining agreement.

Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, brought by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA.[4]

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826. The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers. Simultaneously, two consent decrees were filed. The first decree, entered in April 1974 provided:

[4] Both companies entered this action as amici curiae, asserting an interest in the litigation because collective bargaining agreements to which they are parties contain similar provisions. ALCOA Brief at 1, Reynolds Brief at 1.

> All permanent vacancies in apprenticeships and in entry level jobs in lines of promotion containing occupations which in fact lead to craft jobs, shall be filled on a plant-wide basis from among qualified bidding employees . . . In order to meet the implementing ratio [50 percent], seniority factors shall be applied separately to each group for whom timetables are established and to all other employees.

United States v. *Allegheny-Ludlum Industries, Inc.*, Consent Decree I, BNA FEP Manual, 431: 125, 138-39 (1974). Although that decree had not been entered at the time of the agreement in question here, there was testimony that the Kaiser agreement was influenced by the Allegheny-Ludlum negotiations.[5] The Union was a party to both agreements.

II.

The district court rested its decision on two grounds. First, it held that Title VII prohibited completely any privately imposed "quotas". Alternatively, it found this plan illegal because a court would not have imposed it as a remedy in the circumstances this case presents. The majority properly rejects the first ground. As Judge Gee points out, that position would completely contradict the emphasis Congress laid on voluntary conciliation under Title VII. *See Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Alexander* v. *Gardner-Denver Co.*, 1974, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147. The majority, however, accepted the district court's second ground, and agreed that this plan would not have been imposed by a court.[6] The Court accepted that conclusion

[5] *See* Appendix at 152 (Thomas Bowdle, Kaiser's Director of Equal Opportunity Affairs), 131 (Dennis English, Industrial Relations Supervisor at Gramercy).

[6] The majority opinion leaves in question the status of consent decrees. These decrees, like the one approvd by this Court two years

largely on the strength of the district judge's finding that the defendants had not engaged in discrimination in the past at Gramercy. I believe that the majority has judged the defendants' actions by the wrong standard.[7]

The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albemarle Paper Co.* v. *Moody,* 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L.Ed.2d 280.

Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including

ago in *Allegheny-Ludlum,* may be entered without extensive fact-finding by the district court. If consent decrees are immune from the majority's test, friendly suits would offer employers an easy way to circumvent the holding of this opinion. If they are not immune, the district court, before accepting the consent decree, will be forced to determine the existence and extent of past discrimination by the defendants.

[7] For reasons detailed below, at [App. B, pp. 46a-50a], I believe that the district court's finding that there was no prior discrimination at the Gramercy plant is highly questionable. Even under the majority's standard, the district court must be reversed if that finding is clearly erroneous. Rule 52(a) F.R. Civ. P. My disagreement with the standard the majority applies makes it unnecessary to determine whether this finding falls within Rule 52(a).

this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

The majority's standard will lead to less voluntary compliance with Title VII. Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions, or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the Congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further delayed.

In this case of first impression,[8] we should not hold these defendants to so strict a standard. If an affirmative action

[8] The Supreme Court expressly reserved the question of the validity of "affirmative action programs" when it held that Title VII applied to white male workers. *McDonald* v. *Santa Fe Trail Transportation Co.,* 1976, 427 U.S. 273, 281 n. 8, 96 S.Ct. 2574, 49 L.Ed.2d 493. The Courts of Appeals have considered and rejected "quotas" in some cases where such relief was sought in the district courts. *See, e. g., Chance* v. *Board of Examiners,* 2 Cir. 1976, 534

plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from liability, would encourage private settlements.[9] If this standard were applied to the case before us, we should reverse.

In spite of the district court's finding that the defendants had not discriminated against blacks at Gramercy, there

F.2d 993, *cert denied*, —— U.S. ——, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins* v. *United Steelworkers of America*, 5 Cir. 1975, 516 F.2d 41; *Waters* v. *Wisconsin Steel Works*, 7 Cir. 1974, 502 F.2d 1309, *cert. denied*, 1976 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed. 2d 823. Several lower courts have considered voluntarily instituted preferential hiring in light of Title VII. *See Cramer* v. *Va. Commonwealth University*, 1976, E.D.Va., 415 F.Supp. 673; *Reeves* v. *Eaves*, 1976, N.D.Ga., 411 F.Supp. 531. *Cf. Anderson* v. *San Francisco School Unified District*, 1972, N.D.Cal., 357 F.Supp. 248 not governed by Title VII); *Flanagan* v. *Georgetown University*, 1976, D.D.C., 417 F.Supp. 377 (distribution of scholarship funds, governed by **Title VI**).

The Supreme Court has held that race may "be considered in formulating a remedy" (*North Carolina State Board of Education* v. *Swann*, (1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586); in devising remedies, seniority credits for past discrimination (*Franks* v. *Bowman Transportation Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444); in carrying out a prophylactic program to prevent racially disadvantageous outcomes, whether or not they violate the Constitution (*United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229; in avoiding racially disproportionate effects of employment testing practices (*Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280).

[9] We need not consider in this case the validity of a settlement if actual, as opposed to arguable, discrimination is found by a reviewing court. Even if such a settlement were given no effect, voluntary compliance would be encouraged because the employer would be protected from suits from at least one side.

were arguable violations. The district court made its finding on the basis of testimony from two Kaiser personnel officials. The defendants were never required to rebut a prima facie case, proved statistically, because the statistics were never analyzed by the district court.[10] The reason for the lack of analysis is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Such an analysis would show three possible or probable violations.

First, Kaiser may have discriminated against blacks for unskilled jobs. The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10 percent in 1969. The testimony that Kaiser

[10] Usually, a statistical showing of a significant discrepancy between the percentage of minority group members employed and the percentage of the minority group members in the relevant labor market is sufficient to make a prima facie case for a violation. *See International Brotherhood of Teamsters* v. *United States*, 1977, — U.S. —, —, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *Wade* v. *Mississippi Cooperative Extension Service*, 5 Cir. 1976, 528 F.2d 508, 516-17; *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 120. *See also Hazelwood School District* v. *United States*, 1977, — U.S. —, —, —, 97 S.Ct. 2736, 2741-2744, 53 L.Ed. 2d 768, 777-80; *Dothard* v. *Rawlinson*, 1977, — U.S. —, ——, 97 S.Ct. 2720, 2726-2728, 53 L.Ed.2d 786, 797-98.

had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through nonvalidated tests,[11] or impermissibly subjective processes.[12] The statistics here constituted a prima facie case of discrimination.[13] The district court did not require and the defendants did not present any evidence in rebuttal. Such discrimination would be linked to this case because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority.[14]

Second, the requirement that employees have prior experience in the crafts to enter the limited training program in effect before 1974 may have violated Title VII. Only two of 28 employees trained under that program were black. While there was evidence that each year of a worker's experience saved the company money, no effort was made

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[11] *See* 42 U.S.C. § 2000e-2(h) (1970); *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 425-36, 95 S.Ct. 2362, 45 L.Ed.2d 280; *James* v. *Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 334-40; *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 221.

[12] *See James* v. *Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 345-47; *Bolton* v. *Murray Envelope Co.*, 5 Cir. 1974, 493 F.2d 191, 195; *Rowe* v. *General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359; *United States* v. *Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 442, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

[13] *Compare Dothard* v. *Rawlinson*, 1977, — U.S. —, —, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (relevant labor market 36.89 percent female, employees only 12.9 percent female establishes prima facie case).

[14] Compare this with the majority's ground for rejecting societal discrimination as a justification for this program, *supra* at [App. B, pp. 34a-36a].

to present contrary evidence. The judge simply accepted the statement that prior experience was a business necessity validating the requirement in spite of possible differential effects on blacks and whites. The business necessity defense, however, is narrow. The fact that it may be cheaper or more convenient to use a criterion with divergent impact is not enough to justify its use. *See Watkins* v. *Scott Paper Co.*, 5 Cir. 1976, 530 F.2d 1159, 1168, 1179-83, *cert. denied*, 1976, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *United States* v. *Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2d 652, 662-65; *Local 189, United Papermakers and Paperworkers* v. *United States*, 5 Cir. 1969, 416 F.2d 980, 989-91 *cert. denied*, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100. *See also Jones* v. *Lee Way Motor Freight*, 10 Cir. 1970, 431 F.2d 245, *cert. denied*, 1971, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237; *Pettway* v. *American Cast Iron Pipe*, 5 Cir. 1974, 494 F.2d 211; *Buckner* v. *Goodyear Tire and Rubber*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir. 1973, 476 F.2d 1287 (three cases where training programs were tested against the business necessity standard). *Cf. E.E.O.C.* v. *New York Times Broadcasting Service*, 6 Cir. 1976, 542 F.2d 356 (prior experience not a valid requirement when the previous employer prevented the discriminatees from acquiring experience).

The majority tries to avoid this contention by asserting that the program was "too limited in scope" to be characterized as an unlawful practice. The size of the program may be relevant to the weight to be given the statistics describing it, but the small impact of an action provides no immunity. *See McDonald* v. *Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (two people); *Green* v. *McDonnell Douglas Corp.*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (one person). If past experience does not satisfy the business necessity requirement, and if more whites than blacks had past experience,

then a serious question of Title VII liability is raised even if only one position is at stake.

Third, the requirement of any training for some craft jobs may be illegal. While this claim would be the most easily refuted by an employer, no refutation was even attempted. In light of the extremely narrow scope of the business necessity exception, some rebuttal would be necessary.

The district judge accepted Kaiser's claims of nondiscrimination. It appears from the record that Kaiser did act in good faith. The company made admirable attempts to recruit black craftsmen, and responded strongly to the problem with its unskilled labor force in 1969. Good faith, however, is not a defense to Title VII. Although the three potential violations discussed above may not make the district court's finding "clearly erroneous" in the sense contemplated by Rule 52(a), F.R.Civ.P., arguable violations clearly existed.

To immunize this plan the defendants should also be required to show that the plan is a reasonable remedy. The similar provisions required by courts in Title VII litigation demonstrate that this relief can be reasonable. *See, e.g., Rios* v. *Enterprise Association Steamfitters Local 638,* 2 Cir. 1974, 501 F.2d 622; *United States* v. *Ironworkers Local 86,* 9 Cir. 1971, 443 F.2d 544, *cert. denied,* 1971, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; *Buckner* v. *Goodyear Tire and Rubber Co.,* 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion,* 5 Cir., 476 F.2d 1287. *Cf. Southern Illinois Builders Association* v. *Ogilvie,* 7 Cir. 1972, 471 F.2d 680, upholding a similar program under the Executive Order and *United States* v. *Allegheny-Ludlum Industries, Inc.,* 5 Cir. 1975, 517 F.2d 826, upholding a similar program as part of a consent decree. Three other factors add weight to that conclusion.

First, the plan was negotiated by the employer and the union. The privileges which federal law grants a union as

the representative of the covered workers carry with them the duty to represent in good faith the interests of all the workers. *See Steele* v. *Louisville & N. Rwy. Co.,* 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (Railway Labor Act); *Ford Motor Co.* v. *Huffman,* 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Humphrey* v. *Moore,* 1964, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *Vaca* v. *Sipes,* 1967, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842. An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a majority of the bargaining unit, serves as a check on the fairness of the plan.[15]

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[15] The Union's influence can be seen in the provisions which give white employees a significant share of these new opportunities. One of the Union's major goals was to provide more advancement opportunities for Kaiser employees in place of workers hired off the street. Appendix at 152.

The Union's duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if that requires assisting some of its members more than others.

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. . . . The Court has also held that a collective bargaining agreement may go further enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. . . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of "the highest

Second, the kind of relief given reduced the impact on white workers. Our Court and the Supreme Court have adopted the "rightful place" theory for remedying discrimination. *See International Brotherhood of Teamsters* v. *United States,* 1977, — U.S. —, —, 97 S.Ct. 1843, 1873-75, 52 L.Ed.2d 396, 437-441; *Local 189, United Papermakers and Paperworkers* v. *United States,* 5 Cir. 1969, 416 F.2d 980, cert. denied, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *Gamble* v. *Birmingham Southern R.R. Co.,* 5 Cir. 1975, 514 F.2d 678, 683; *Bing* v. *Roadway Express, Inc.,* 5 Cir. 1973, 485 F.2d 441. Other circuits also adopted the rightful place theory as a fair solution. *See, e.g., United States* v. *Navajo Freight Lines,* 9 Cir. 1975, 525 F.2d 1318; *Reed* v. *Arlington Hotel Co.,* 8 Cir. 1973, 476 F.2d 721, *cert. denied,* 1973, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (remedy must consider the interests of both groups); *United States* v. *Bethlehem Steel Corp.,* 2 Cir. 1971, 446 F.2d 652, 659.

The rightful place remedy was originally seen as a compromise among three competing theories: "freedom now", "rightful place", and "status quo". *Local 189,* 416 F.2d at 988. The "freedom now" remedy would have displaced white workers in an effort to completely eliminate the effects of past discrimination. The "status quo" remedy would protect all the expectations acquired by white workers. The "rightful place" theory did not attempt to displace white workers, but required that any future actions be untainted by past discrimination. Since that time, some judges have expressed reservations about ordering relief which put too great a burden on white employees to assist blacks: "robbing Peter to pay Paul". *Franks* v. *Bowman Transportation Co.,* 1976, 424 U.S. 747, 781, 96 S.Ct. 1251, 47 L.Ed.2d 444 (Burger, C. J., dissenting). *See id.,* 424 U.S. at 787-91, 96 S.Ct. 1251 (Powell, J., dissenting and concurring). The most prominent recent cases where a court refused to order a "quota" remedy involved lay-offs, when such a quota would have meant that whites would have lost their jobs in deference to less senior blacks. *See Chance* v. *Board of Examiners,* 2 Cir. 1976, 534 F.2d 993, *cert. denied,* 1977, — U.S. —, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins* v. *United Steelworkers of America,* 5 Cir. 1975, 516 F.2d 41; *Jersey Central Power & Light Co.* v. *IBEW,* 3 Cir. 1975, 508 F.2d 687, *vacated and remanded,* 1976, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812, *on remand,* 3 Cir., 542 F.2d 8; *Waters* v. *Wisconsin Steel Works,* 7 Cir. 1974, 502 F.2d 1309, *cert. denied,* 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823; *Anderson* v. *San Francisco School District,* 1972, N.D.Cal., 357 F.Supp. 248; *cf. Kirkland* v. *New York State Dept. of Correctional Services,* 2 Cir. 1975, 520 F.2d 420 (quotas should not be imposed when identifiable white "victims" of the remedy exist).

In the instant case entirely new rights were created by the plan. None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement. Only those workers with prior experience had been eligible for training, and that pool had been exhausted. No white workers lost their jobs, none had expectations disappointed. Instead, the defendants created entirely new expectations in all the employees, without harming the chances of any Kaiser employee for such training.

Finally, the plan is reasonable because it allows significant white participation. Although the fastest way to remedy past discrimination would have been to institute a

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priority," is certainly no less than in other areas of public policy interests.

Frank v. *Bowman Transportation Co.,* 1976, 424 U.S. 747, 778-79, 96 S.Ct. 1251, 1271, 47 L.Ed.2d 444, 469-70.

training program just for blacks,[16] the Agreement provides that 50 percent of the workers trained will be white. Every Kaiser employee can benefit from the program. It is true that black employees receive more than their white colleagues, but the black employees arguably faced racial discrimination at Kaiser's hands—the white workers did not. This white participation makes the plan more reasonable. *See Carter* v. *Gallagher*, 8 Cir. 1972, 452 F.2d 315 (en banc), *cert. denied*, 1972, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338; *United States* v. *N. L. Industries*, 8 Cir. 1973, 474 F.2d 354; *Patterson* v. *Newspaper Deliverers' Union*, 2 Cir. 1975, 514 F.2d 767, 773, 775, *cert. denied*, 1976, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203.

Thus, the 1974 Agreement was a reasonable response to the situation. The defendants were faced with arguable violations of Title VII, federal government pressure, and the impending steel industry settlement. They created an affirmative action plan which aided all Kaiser employees while particularly assisting minority group members. We should not upset their efforts.[17]

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[16] A program of pre-training preparation exclusively for blacks was approved by this Court in *Buckner* v. *Goodyear Tire and Rubber Co.*, 5 Cir. 1973, 476 F.2d 1287, *aff'd without opinion*, 1972, N.D.Ala., 339 F.Supp. 1108. In a dissenting opinion strenuously attacking the use of quota remedies, Judge Hayes of the Second Circuit stated that training programs exclusively for blacks were legitimate affirmative action. *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 2 Cir. 1974, 501 F.2d 622, 637.

[17] One advantage of the standard I propose is that it takes the reasonableness of the remedy into consideration. The majority is concerned mainly with the existence of past discrimination. Once such discrimination is found, the only question appears to be whether a district court could have imposed such a remedy. A district court's remedial authority in Title VII is extremely broad.

"The provisions of this subsection [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible."

118 Cong. Rec. 7168 (1972), Section-by-Section Analysis of Equal Employment Opportunity Act of 1972. The standard proposed in this dissent would limit private parties more than § 706(g) limits the judiciary by requiring that the remedy be "reasonable."

III.

The defendants' actions may also be upheld as a proper response to societal discrimination against blacks. The majority avoids the merits of this contention.

The Court does not deny that discrimination by craft unions may have had a major effect on the number of black craftsmen. The majority, however, focuses on the question of seniority. Those affected by the claimed discrimination are now unskilled workers. Because of the lower court's determination that there was no discrimination at Kaiser's Gramercy plant, those unskilled workers have a seniority status which is unaffected by past discrimination. The majority then concludes that past discrimination cannot justify modification of this untainted seniority system to produce the job training ratios used.

> "Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII."

The majority's error is in its last step. It connects the ratio with a change in the seniority system, but that misses the point. Seniority was the system voluntarily adopted by the defendants to allocate scarce opportunities within the

black and white employee groups created by this plan. Although seniority is a major tool in modern labor relations, it is a voluntary tool. Unions and employers may agree on other methods of allocation. If, for example, the training program had provided that training opportunities would be divided among able black and white workers by two separate lotteries, the majority's error would be clear. Although the past discrimination against blacks would not in any way affect their lottery numbers, that would have no implications for the validity of the program. The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools is irrelevant. Admissions were not "admittedly and purely functions of seniority", they were functions of race first, then seniority. No other situation existed before 1974, because there was no such training program before the 1974 Agreement. The only training program that existed then made admission a function of experience, not seniority. The Court cannot avoid the merits of the defendants' assertion—societal discrimination justifies this plan.

Therefore, I am forced to confront directly the relationship between societal discrimination and Title VII. This is best dealt with by considering two subsidiary questions: May employers compensate employees for societal discrimination, and may race be used as a sign of societal discrimination?

Although the first question does not appear to have been passed upon in the courts, the answer should be "yes". While the government might not be able to require that restorative justice be done, neither should it prevent it. Title VII prohibits only discrimination by race, sex, religion, or national origin. In other respects the discretion of the employer remains. There should be no objection to an

employer preferring, for whatever reasons, employees who have faced discrimination. *See* [App. B, pp. 31a-34a].

The second question is more difficult. If employers may assist those victimized by past discrimination, may they use race as a proxy for the existence of such discrimination? A broad acceptance of that proposition could have drastic effects. Most of the ethnic groups represented in this country have been discriminated against at one time or another. If Americans of Irish, Italian, Jewish, or German extraction were allowed employment preferences as compensation for undoubted past societal discrimination, Title VII would be eviscerated.

Yet a negative answer to that question would also have serious implications. Acknowledged and damaging past discrimination would be without a private remedy in employment training. Unless a member of a minority group could show explicit discrimination, the laws that forbid future discrimination by employers would also forbid corrective action for past discrimination by others. If a large number of the people involved are not able to show this specific discrimination, then the group will be caught in the cycle caused by discrimination. The future laps of the race will be of equal length, but blacks, Latin-Americans, Asian-Americans, and women will have to start behind the other competitors.

In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities.[18] Yet how many of the

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[18] Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice. *See, eg. United States* v. *International Union of Elevator Constructors*, 3 Cir. 1976, 538 F.2d 1012; *Associated General Contractors of Massachusetts* v. *Alshuler*, 1 Cir. 1973, 490 F.2d 9, *cert. denied*, 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *United States* v. *Wood, Wire and*

excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find craft jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. The result would be a wrong without a remedy.

Some measures to compensate for past discrimination are provided by law currently. The federal government provides by statute a number of preferences for minorities.[19]

Closer to this case, employment discrimination law itself imposes requirements on employers which can be viewed only as compensation for racial isolation and its effects.

Metal Lathers, 2 Cir. 1973, 471 F.2d 408, *cert. denied,* 1973, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398; *Southern Illinois Builders Association* v. *Ogilvie,* 7 Cir. 1972, 471 F.2d 680; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 3 Cir. 1971, 442 F.2d 159; *cert. denied,* 1971, 404 U.S. 854, 92 S.Ct. 447, 30 L.Ed.2d 367; *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler,* 5 Cir. 1969, 407 F.2d 1047; *Buckner* v. *Goodyear,* 1972, N.D.Ala., 339 F.Supp. 1108, *affd without opinion,* 5 Cir. 1973, 476 F.2d 1287.

The "home town plans," favored by recent Secretaries of Labor as an alternative to the Philadelphia-type plans, have not brought a great improvement. N.Y. Times, October 16, 1977 § 4, at 2, Col. 4.

[19] *See* Brief of the United States as Amicus Curiae, *Regents of the University of California* v. *Bakke,* U.S. No. 76-811 (argued Oct. 12, 1977), Appendix A. These programs may be of doubtful constitutionality pending the outcome of *Bakke.*

Thus, Title VII's requirement that employment tests must be validated does not require a finding that the employer chose the tests to produce discrimination, nor a finding that the employer produced the conditions that caused lower minority scores on the tests. Instead, it rests on a Congressional purpose not to allow the effects of past discrimination to affect employment decisions when those effects are not job-validated. Similarly, special recruiting efforts aimed at minority groups, often imposed under affirmative action programs,[20] are not conditioned on a showing that the employer intentionally selected the "white" media for recruiting. Instead, it is an effort to compensate for the isolation of minority groups from the mainstream of society, caused at least in part by past discrimination.

This dissent is not the place to explore the contours of a societal discrimination justification for employment or training preferences. However, when the discrimination is as egregious and recent as that against blacks in the crafts, a reasonable preference in training programs should be upheld.

IV.

A third ground for upholding the defendants' actions is that their program was required by Executive Order 11246, 30 Fed.Reg. 12319. This Executive Order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, starting from the assumption that most disproportionately low employment is the result of discrimination—if not of the contractor involved, then of someone else. I disagree with the majority's view that if the Executive Order purports to legalize this program, the Executive Order is invalid. I believe, however, that the district court would have

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[20] *See* 41 C.F.R. § 60-2.24(e) (1976).

to determine whether this plan does in fact comport with the requirements of the Executive Order. Therefore, on this ground I would remand the case to the district court for further proceedings.

I do not disagree with the majority's conclusion that if a conflict between the Executive Order and Title VII exists, it should be resolved in favor of Title VII. But that weighty question of the allocation of power between the legislative and the executive branches of government need not be reached. Here, the two are not in conflict.

As the majority points out, affirmative action plans under the Executive Order have been held constitutional. *See E.E. O.C.* v. *A.T. & T.*, 3 Cir. 1977, 556 F.2d 167, *aff'g*, 1976, E.D. Pa., 419 F.Supp. 1022; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 3 Cir. 1971, 442 F.2d 159; *Southern Illinois Builders Association* v. *Ogilvie*, 7 Cir. 1972, 471 F.2d 680; *Mele* v. *Department of Justice*, 1975 D.N.J., 395 F.Supp. 592, *aff'd without opinion*, 3 Cir. 1976, 532 F.2d 747. *Cf. Associated General Contractors of Massachusetts* v. *Altshuler*, 1 Cir. 1973, 490 F.2d 9, *cert. denied*, 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *Joyce* v. *McCrane*, 1970 D.N.J., 320 F.Supp. 1184; *Weiner* v. *Cuyahoga Community College*, 1968 Ohio Ct. of Appeals, *aff'd mem.*, 1969, 19 Ohio St.2d 35, 249 N.E.2d 907, *cert. denied*, 1969, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (similar state plans). For a history of the Executive Order and the response to it in Congress and the courts, *see* Comment, The Philadelphia Plan: A Study on the Dynamics of Executive Power, 39 U.Chi.L.Rev. 752 (1972).

The majority seeks to distinguish *Contractors Ass'n of Eastern Pennsylvania* by stressing the finding there that discrimination had existed in the industry. It should be noted that the parties involved in that case were the contractors; the groups discriminating were the crafts unions.

The opinion is in fact directly in point in that respect because it involved actions of the non-discriminating parties.[21]

The legal situation has changed significantly since that opinion. Congress has implicitly exempted the Executive Order from the constraints of Title VII.[22] *See* Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 751-57 (1972). Congress did so through three actions taken during consideration of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261. At that time the regulations requiring affirmative action in the form of goals and timetables had been in effect for several years. The "Philadelphia Plan", the subject of the *Associated Contractors* decision, had been in effect for three years.

The legislation originally presented would have transferred the entire Executive Order enforcement program to

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[21] The plaintiffs in that case were a contractor's association and several intervening contractors. The unions, against whom the findings of exclusionary practices was lodged, participated only as amici. Thus, the contractors were in the same position that Kaiser finds itself in here.

[22] The predecessor of this Executive Order was mentioned in the 1964 Act in a section dealing with necessary reports, § 709(d), 42 U.S.C. § 2000e-8(d) (1970). It could be argued that the Order was protected by § 1103, 42 U.S.C. § 2000h-3 (1970), which is a saving clause for then existing authority for federal action.

It could also be argued that the rejection in 1969 of the so-called Fannin Rider demonstrated Congressional approval of the Executive Order. The Comptroller General had declared the Philadelphia Plan illegal on the ground that it lacked standards needed to comply with rules regulating competitive bidding. Senator Fannin introduced a rider to an appropriations bill which would have denied all funds for any contracts held illegal by the Comptroller General. The debate made clear that the Philadelphia Plan was the target of the Rider. *See Comment*, The Philadelphia Plan, *infra*, 747-50.

the E.E.O.C. Congress eliminated that provision by an amendment offered by Senator Saxbe. In support of the amendment, the Senator stated:

> It has been the "goals and timetables" approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

118 Cong.Rec. 1385 (1972). Another amendment which would have had substantially the same result as the original language was rejected by Congress. 118 Cong.Rec. 3367-70, 3371-73, 3959-65 (1972).

The most telling action was the rejection by the Senate of an amendment to § 703(j) of Title VII, offered by Senator Ervin. The Ervin amendment would have extended that section to read:

> Nothing contained in this title or *in Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual. . . . [Emphasis added.]

118 Cong.Rec. 1676 (1972). This amendment was viewed and debated as an attack on Philadelphia-type plans. *See* 118 Cong.Rec. 1664-65 (1972) (Sen Javits).[23]

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[23] Senator Javits made clear the connection between the Philadelphia Plan and the Ervin Amendment:

"First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans."

118 Cong.Rec. 1665 (1972). The *Contractors Association* decision, which upheld the Philadelphia Plan, was printed in the Congressional Record at Senator Javit's request.

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1844 (1972). With the decision in *Contractors Association* before it, there can be little question that whatever was the status of that opinion before 1972, Congress ratified the Philadelphia Plan as consistent with Title VII.

The district court did not pass upon the validity and applicability of the Executive Order. There is a question whether Kaiser's extensive recruiting efforts before 1974 completely satisfied the requirements of the Executive Order. *See* 41 C.F.R. § 60-2.1 *et seq.* Furthermore, the regulations promulgated under the Executive Order disclaim any intent to impose a "quota." 41 C.F.R. § 60-2.30. If the majority is right about the effect of Title VII on this litigation, apart from considerations of the Executive Order, then the disavowal in the regulations of quotas might be read in the same way. Those questions require the consideration of the trial court. Therefore, if I accepted the majority's position that Title VII, apart from the Executive Order, pro-

hibited the conduct in question, I would still vacate the decision and remand it for further proceedings.[24]

V.

"Reverse discrimination" is a question of great current concern. It has spawned an extensive literature, and caused heated debates, some between former allies.[25] It is a troubling question. The color blind constitution, so eloquently invoked by the first Justice Harlan, has great appeal. A person's color should not be relevant to most decisions. This Court knows that acceptance of that principle did not come easily. At this stage in the history of eliminating racial discrimination, the use of a racial criterion because it is "benign" pulls us perilously close to self-contradiction. But in spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser

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[24] If, on remand, the district court were to conclude that the Executive Order was not violated by this plan, then a constitutional question might arise about the validity of this federal action. Of course, I express no opinion on the merits of that constitutional question. *See United Jewish Organizations of Williamsburgh* v. *Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229; *Califano* v. *Webster*, 1977, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360; *Bakke* v. *Regents of the University of California*, 1976, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, *awaiting decision*, ... U.S. ....., 98 S.Ct. ....., 53 L.Ed.2d ..... (Argued October 12, 1977).

[25] Among the more interesting treatments of this question are R. Dworkin, Taking Rights Seriously 223-39 (1977); N. Glazer, Affirmative Discrimination (1976); Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv.L.Rev. 1 (1976); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L. Rev. 723 (1974); Fiss, Groups and the Equal Protection Clause. 5 J.Phil. & Pub.Aff. 107 (1976); Fiss. A. Theory of Fair Employment Laws, 38 U.Chi.L.Rev. 235 (1971); Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw.L.Rev. 363 (1966).

and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal. Therefore, I respectfully dissent.

APPENDIX C

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Defendants-Appellants.*

No. 76-3266.

United States Court of Appeals, Fifth Circuit.

April 17, 1978.

Appeals from the United States District Court for the Eastern District of Louisiana; Jack M. Gordon, Judge.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion Nov. 17, 1977, 5 Cir. 1977, 563 F.2d 216).

Before WISDOM,* GEE and FAY, Circuit Judges.

The Petitions for Rehearing are DENIED[1] and the Court having been polled at the request of one of the mem-

* Wisdom, J., dissents from the denial of Petition for Rehearing for the reasons stated in his dissenting opinion at 563 F.2d 227-38.

PER CURIAM:

[1] On rehearing it is suggested that our quotation from the panel opinion in *Carter* v. *Gallagher,* 452 F.2d 315, 325 (8th Cir. 1971) is inappropriate since the en banc court, 452 F.2d 327 *et seq.,* in fact instituted a modified minority hiring quota on rehearing. *Carter,* however, was a case in which past racial discrimination in hiring at the "plant"—in that instance a fire department—was established. Our case is the contrary, and we are not persuaded that the en banc determination there is at variance with our decision here. At all events, we agree with the quotation as applied to our context.

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are also DENIED.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-1103

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

v.

BRIAN F. WEBER, ETC., ET AL.

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 15, 1978.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 5th day of July, 1978.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1103

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

v.

BRIAN F. WEBER, ETC., ET AL.

Order Further Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including September 14, 1978.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 9th day of August, 1978.

Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kaiser Aluminum & Chemical Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 563 F.2d 216 (1977); the denial of the petition for rehearing and petition for rehearing en banc (Appendix B) is reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix C) is reported at 415 F. Supp. 761 (1976).

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1977 (Appendix H). A petition for rehearing and a petition for rehearing en banc were denied on April 17, 1978 (Appendix B). A timely application for an extension of time to file this petition was granted up to and including September 14, 1978 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May an employer and a union lawfully consider race in the selection of employees for participation in a new craft training program established in part to remedy the past exclusion of minorities from craft employment?

STATUTORY PROVISIONS INVOLVED

Sections 703(a), 703(d), 703(h), and 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e; Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), *reprinted in*, 42 U.S.C. § 2000e at p. 281 (1970); and Revised Order No. 4, 41 C.F.R. § 60-2 (1977) are set out in Appendices E, F and G, respectively.

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation is a government contractor, subject to the affirmative action requirements of Executive Order 11246, as set forth in Revised Order of No. 4, 41 C.F.R. § 60-2. Employees at its Gramercy, Louisiana, plant represented by the United Steelworkers of America, AFL-CIO, include

both unskilled workers and experienced, skilled craft workers.

The area workforce in Gramercy was about 39 percent black when this case was tried in 1975. The total Kaiser workforce was 14.8 percent black at the time, up from 10 percent in 1969 when under pressure from its contract compliance agency, the company began hiring unskilled workers on a one-to-one black to white ratio. Despite this effort, prior to 1974, only five out of 290 craft workers at the Gramercy Plant—i.e., 1.7 percent—were black. A significant factor in the near absence of minorities from the crafts was Kaiser's requirement that applicants have prior experience in the crafts. Because blacks had long been excluded from the craft unions, few were able to present such credentials.

Kaiser was pressed by its contract compliance agency to alleviate this situation and to take steps to assure minority representation in the crafts. At the same time, the Steelworkers were engaged in negotiating a resolution to this and other charges of race and sex discrimination in the steel industry. The results of those negotiations were embodied in the consent decree approved in *United States* v. *Allegheny-Ludlum Industries, Inc.*[1]

As a result, in 1974, the company and the union entered into an agreement creating a new craft training program at each of 15 plants. Under this new program, incumbent employees—white as well as minority—who did not have experience in craft work were afforded an opportunity for the first time to train for craft jobs. As in the craft training program approved

[1] 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

in the Steel Consent Decree, minority and white employees were to share equally in the trainee vacancies, based on relative seniority within each racial group until underutilization of minorities was eliminated. In the first year of the program at Kaiser's Gramercy plant, six white and seven black employees were admitted to the training program. No black employees would have been included among the trainees if selections had been made exclusively on the basis of seniority without regard to race.

Respondent, Brian Weber, was one of the white employees who sought admission to the new trainee program in 1974. He was not selected while less senior minority employees were chosen.[2] His complaint followed alleging that he had been discriminated against because of his race in admission to a training program in violation of §§ 703(a), (d) and (j) of Title VII of the Civil Rights Act of 1964, as amended.

The company, in response, pointed to its affirmative action obligations as a federal contractor under Executive Order 11246. Although the company denied any prior acts of discrimination, it did not offer a detailed justification for the disproportionately small share of its production and craft workforce held by minorities.[3] Moreover, the company witnesses conceded

[2] If the sole prerequisite for selection into the training programs had been plant seniority, Weber would not have been a selectee. Between 35 and 40 employees bidding on the three jobs on which Weber bid had more seniority. Trial transcript at p. 94; Fifth Circuit Appendix at p. 139.

[3] A witness for Kaiser testified that in the past the company had selected the applicants whom it considered best qualified for production jobs and that it had actively sought experienced minority craftsmen in recent years. Trial transcript at pp. 55, 85; Fifth Circuit Appendix at pp. 99, 129.

that Kaiser knew that its requirement for prior experience for craft applicants had a disparate impact on blacks because of their former exclusion from craft unions. This requirement was explained in terms of cost savings to the company.

The District Court decided in Weber's favor on two grounds. First, it held that Title VII prevents employers and unions from voluntarily adopting employment selection quotas based on race even if a court would be empowered to impose them in a litigated case or in a consent decree. Second, it accepted Kaiser's denial of discrimination and declared that even a court would not be authorized by Title VII to impose racial quotas in the absence of a finding of discrimination against the company. The District Court also concluded that the company's obligations under the Executive Order must be subordinated to the specific requirements of Title VII.

Although the Court of Appeals rejected the District Court's holding that the scope of voluntary remedial action was more limited than that which a court could approve or impose, it held that in the absence of evidence to support a finding of prior discrimination by the company neither Title VII nor Executive Order 11246 would support the race-based selection system which Kaiser and the Steelworkers had instituted.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That a Race-Based Selection System Is Lawful Only to the Extent It Remedies Prior Discrimination by the Employer Involves Issues Raised But Not Resolved by This Court's Decision in *Bakke* and Which Urgently Need Resolution by This Court

The Fifth Circuit held in this case that "[i]f Executive Order 11246 mandates a racial quota for admission to on the job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall . . . ."[4] Thus, according to the Fifth Circuit, any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII unless the employer or others are prepared to establish that the employer engaged in past discriminatory acts.

As Judge Wisdom recognized in dissent, this is the "wrong standard" and will put an end to voluntary compliance with the affirmative action mandates of both Title VII and Executive Order 11246.

> The employer and the Union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable.[5]

[4] 563 F.2d at 227.

[5] 563 F.2d at 230. The accuracy of this comment can be seen by comparing the decision below with a subsequent decision of the Fifth Circuit in which the Court held that a prima facie case of discrimination in entry to the crafts at another Kaiser plant was presented by evidence of underutilization of minorities and a prior industrial experience requirement. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381-82 (5th Cir. 1978).

In *Regents of the University of California* v. *Bakke*,[6] this Court grappled with racial preferences in the admission system of a state and federally supported medical school. A majority of the Court held that race could be a factor in selecting students for admission. However, only four Justices supported the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities. Another group of four Justices declared that Title VI of the Civil Rights Act of 1964 prohibits any exclusion from programs which are federally funded regardless of whether or not such exclusion carries with it a racial stigma. Mr. Justice Powell agreed with this latter group that a racial classification cannot be justified simply because its purposes may be benign or simply to promote ethnic diversity. However, his ultimate determination that the medical school's admission system was not justifiable was based on his conclusion that the selection system was unnecessary to the accomplishment of any compelling public interest.[7]

In the course of his opinion, Mr. Justice Powell frequently contrasted the factors in the *Bakke* case with those involved in numerous employment discrimina-

[6] 98 S.Ct. 2733 (1978).

[7] Essentially, Mr. Justice Powell concluded that the admissions system could not be justified as remedying "identified discrimination" or as improving the delivery of health care services to communities currently under served, and that the school's interest in attaining a diverse student body could be met effectively by favorably considering race and ethnic background in a selection process in which all applicants compete for all positions.

tion cases where quota remedies were approved.[8] However, those references leave open questions regarding the appropriate use of racial preferences in employment under Title VII and Executive Order 11246.

Many of these questions can and need to be resolved in this case. Racial preferences are an indispensable means of ending the exclusion of minorities from many occupational categories such as the industrial apprentice and craft jobs at issue here. More subtle attempts to "consider" race or ethnic origin are ill suited and ineffective in situations where little or no room is left for management discretion and vacancies are regularly awarded to the most senior or experienced candidate.[9] In such situations, unless preferences are allowed, sig-

[8] In the context of Title VII litigation, Mr. Justice Powell noted the existence of

> legislative determinations wholly absent here that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.

98 S.Ct. at 2758 n. 44. Mr. Justice Powell also pointed out that Title VII remedies flow not only from a discovery of disparate impact but also from the absence of any showing that the practice causing that impact was job related. In contrast, he found nothing in the *Bakke* record that

> even remotely suggests that the disparate impact of the general admissions program at the Davis Medical School . . . is without educational justification.

Id. And unlike the cases which involved racial preference in employment prescribed or agreed to by competent administrative agencies, Mr. Justice Powell concluded that the medical school in *Bakke* neither purported to nor was in a position to establish that the racial classification it had adopted was responsive to identified discrimination. *Id.* at 2754-55, 2758.

[9] Such seniority systems, if bona fide, are not made unlawful by their perpetuation of past discrimination or underutilization. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977). However, this does not mean

nificant change will only occur as new minority employees slowly attain sufficient seniority or experience to preempt vacancies for themselves.

Moreover, the judicial and administrative resources available to direct the application of Title VII and Executive Order 11246 are limited and both laws emphasize voluntary compliance. It is simply not feasible to have governmental bodies make specific findings of past discrimination and to prescribe the precise remedial action to be undertaken by each employer or group of local contractors.

Regulations issued under Executive Order 11246 declare that Kaiser and other government contractors are required to develop and implement an acceptable affirmative action program.[10] Such a program

> must include an analysis of areas within which the contractor is deficient in the utilization of mi-

that such systems are not subject to change where necessary for affirmative action purposes, EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978) or by the parties for other lawful reasons. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[10] Pursuant to Section 202 of the Executive Order, government contractors are not only prohibited from discriminating on the basis of race, color, religion, sex or national origin in their employment practices but they are also obligated to take affirmative action to ensure against such discrimination. The disclaimer in Section 703(j) that Title VII does not require racial preferences to correct imbalances in an employer's work force has been held not to apply to the affirmative action obligations of Executive Order 11246. Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977); *cert. denied*, 46 U.S.L.W. 3780 (1978). During the 1972 amendments to Title VII, a proposal to make Section 703(j) applicable to the Executive Order as well as Title VII was defeated. 118 Cong. Rec. 1676 (1972); *see also*, 563 F.2d at 238.

> nority groups and women and further, goals and timetables . . . to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force . . . .

41 CFR § 60-2.10. Those regulations further state that the Government has concluded that skilled craft work is one of the categories in which minority groups are most likely to be underutilized and that each contractor shall direct special attention to craft jobs in his analysis and goal setting.[11]

The record in this case abundantly reflects Kaiser's attempts to comply with those regulations. It also demonstrates the lack of any practical means of compliance other than the racial classification which it adopted for selecting new craft trainees.[12]

In view of the substantial liabilities and other costs which can flow from employment discrimination, it is difficult to imagine a greater deterrent to affirmative action than the Fifth Circuit's insistence in this case on evidence of discrimination by Kaiser. After agreeing to forego hiring experienced craftsmen and to incur the cost of training inexperienced employees, Kaiser responded to the challenge to its selection program with testimony about its prior underutilization of black craftsmen and production workers. Its witnesses explained the qualification standards it had used for hiring production workers in only the most general terms[13] and simply denied that its actions were discriminatory. Few, if any, employers can be expected to risk more in the name of equal employment opportunity. None should be expected to confess to past discrimination in order to justify a challenged racial preference.

We respectfully submit that consistent with the views of a majority of this Court in *Bakke,* the racial classification agreed to by Kaiser and the Steelworkers can be justified as an essential means of effectuating either or both of two compelling and administratively determined interests: (1) an interest in action "to ensure against" discrimination[14] which is no less substantial than that in remedying past discrimination and (2) an interest in action to "assure utilization of all segments of society and the available labor pool"[15] comparable to the public school's interest in a diverse student body. If more is required to justify the racial classifications needed to provide meaningful employ-

[11] 41 CFR § 60-2-11. Section 60-2.12 *et seq.* of those regulations sets forth the criteria contractors are to apply in developing their goals and timetables.

[12] Kaiser could not find experienced minority craftsmen in significant numbers. Trial transcript at pp. 54-56, 98-99; Fifth Circuit Appendix at pp. 98-100, 142-43. During negotiations, the union would not abandon its consistent prior position that current employees be preferred over inexperienced new hires for these sought after craft jobs. Trial transcript at p. 108; Fifth Circuit Appendix at p. 152. Selecting craft trainees from among current employees on the basis of seniority would produce relatively few minority trainees because of the company's disproportionately low selection of minorities. Trial transcript at pp. 68-69, 92; Fifth Circuit Appendix at pp. 112-13, 136.

[13] This Court has observed that " 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systemic exclusion.' Alexander v. Louisiana, 405 U.S. 625, 632." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 n. 24 (1977).

[14] While the objective of ensuring against discrimination is stated in Section 202 of Executive Order 11246 as requiring affirmative action by employers, Title VII has a similar "prophylactic" objective. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[15] EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3803 (1978).

ment opportunities to minorities than that which is present in the record in this case,[16] then both government agencies and private groups should have the direction which only this Court can supply.

II. The Court of Appeals' Holding Conflicts With the Decisions of Several Other Courts of Appeals

In this case, the Fifth Circuit affirmed the District Court's holding that:

> Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

563 F.2d at 223. The Court of Appeals, therefore, rested its ultimate conclusion that the selection system adopted by Kaiser and the Steelworkers was unlawful upon two related holdings: (1) A race-conscious selection system violates Title VII unless the preferred workers are identifiable victims of unlawful discriminatory practices; (2) a race-conscious employment selection system violates Title VII absent an admission or facts to support a finding of past discriminatory employment practices on the part of the employer.[17] Both holdings place the Fifth Circuit in substantial conflict with a number of other Courts of Appeals.

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[16] It may be suggested that this case should be remanded in order to allow the record to be supplemented. The company considers the record adequate to resolve the issues it has raised in this petition, but does not object to such a remand.

[17] In denying rehearing, the Fifth Circuit appears to have taken the position that remedial action either must be limited to individual victims of past discrimination or past discrimination must be established against the employer. 571 F.2d at 337 n. 1.

Sound administration of justice would require the resolution of conflicts among the circuits on such basic matters, even if the parties involved were only subject to the jurisdiction of one of the Courts of Appeals involved in these conflicts. However, there is an added reason for resolving the conflicts in this case, because the agreement between Kaiser and the Steelworkers which has been challenged here is national in scope.

A. The Fifth Circuit's Holding That a Racial Preference is Forbidden Unless it is Enacted to Restore Employees to Their Rightful Places Conflicts with the Decisions of Other Courts of Appeals

In rejecting the selection ratio adopted by Kaiser and the union to implement the craft training program, the Court of Appeals asserted that racial preferences are lawful only for the benefit of victims of employment discrimination. "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII," the court wrote. 563 F.2d at 225. Further, "a minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment . . . 'because and *only to the extent that he has been discriminated against.*'" *Id.* at 224-25. (Emphasis added). Both of these statements and others misconstrue the concept of class relief endorsed by this Court under Title VII and by several other Courts of Appeals dealing with class preferences adopted pursuant to Executive Order 11246.

It is true, of course, that Title VII authorizes courts to provide "make-whole" relief to individuals to com-

pensate them for past discrimination. But Title VII does not preclude class relief. To the contrary, this Court has recognized that another, indeed foremost objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Thus there are, in Mr. Justice Powell's words, "two distinct congressional purposes implicit in Title VII." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 783 (1976) (concurring).

Title VII was invoked by Respondent Weber in this case not to authorize a remedy of either kind, but to foreclose one. Citing *Carter* v. *Gallagher* for the proposition—subsequently rejected in that case by the Eighth Circuit En Banc [18]—the Fifth Circuit held that Title VII prohibits preferential treatment of minorities not previously injured by the employer. In denying the petition for rehearing the Fifth Circuit sought to distinguish this case from *Carter* [19] but the conflict seems inescapable. A similar conflict exists with the Ninth Circuit which, relying on *Carter*, has held that "we do not believe that such [race-conscious] relief may be limited to identifiable persons denied employment in the past . . . ." [20]

Moreover, the Fifth Circuit in its decision below went on to impose this same prohibition on preferences for nonvictims to affirmative action programs adopted pursuant to Executive Order 11246. The Third Circuit in *EEOC* v. *AT&T*,[21] recognized the fallacy of this proposition under the Executive Order.[22] That court declared that the Executive Order is:

> a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII. Certainly that broader governmental interest is sufficient in itself to justify *relief directed at classes rather than individual victims of discrimination.* (Emphasis added).

556 F.2d at 175.

B. The Fifth Circuit's Standard for Determining Whether Race-Conscious Employee Selections Should be Approved Conflicts with that Adopted by Other Courts of Appeals

Race-conscious employee selection procedures instituted under Executive Order 11246, or under a supplement to the Executive Order adopted by a state agency, have withstood complaints that they imposed

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[18] 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[19] 571 F.2d at 337.

[20] Davis v. County of Los Angeles, 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (1978).

[21] 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978).

[22] Like Kaiser, AT&T denied that it had ever discriminated. 556 F.2d at 170. However, AT&T's denial and the absence of any findings of discrimination in the consent decree did not prevent the court from upholding the lawfulness of the racial classifications contained in the decree under Title VII as well as under the Executive Order. The court accepted the Government's allegations as being true for purposes of evaluating the remedy. Thus what distinguishes this case from *AT&T* is the absence of a party alleging past discrimination. If, however, voluntary use of racial classification in employment can only be sustained where the employer secures the intervention of a party who will charge it with past discrimination, affirmative action will be sharply reduced.

unlawful racial quotas in the First Circuit [23] and the Seventh Circuit [24] as well as the Third Circuit.[25] In each of these circuits, contractors challenged the racial employment programs prescribed for government construction work.[26] In each case the programs were upheld without any findings by the court that the complaining *employers* had ever discriminated against the minority employees.

Instead of insisting on evidence of discrimination by the employers represented in the litigation, as the Fifth Circuit did in this case, the First, Third and Seventh Circuits looked elsewhere to justify the racial programs. First they took note of administrative determinations that minorities were substantially underrepresented among the skilled craft employees hired by all contractors. Second they observed that such underrepresentation largely resulted from the historical exclusion of minority employees from the building trades unions which supplied craftsmen to the contractors.

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[23] Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[24] Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).

[25] Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[26] The fact that the government has chosen to establish more specific and localized standards for affirmative action programs for construction contractors than for nonconstruction contractors is not legally significant. Nonconstruction contractors no less than construction contractors are required to adopt and make good faith efforts to achieve their affirmative action goals within the guidelines provided by the Office of Federal Contract Compliance. *See* discussion, *supra*, at pages 9-10.

Similar facts exist in this record: Prior to 1974, blacks constituted only 1.7 percent of the skilled craft employees hired by Kaiser in an area with a 39 percent black workforce. Both witnesses called by Kaiser attributed this disparity to the craft unions which had not trained or admitted black employees in the past.[27] Thus, under the legal standard used in three other Courts of Appeals, the affirmative action program instituted by Kaiser and the Steelworkers would not have been found to violate Title VII.[28]

CONCLUSION

For the reasons stated above, Kaiser respectfully requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Firth Circuit.

Respectfully submitted,

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[27] Trial transcript at pp. 56, 102; Fifth Circuit Appendix at pp. 100, 146.

[28] While Mr. Justice Powell referred to these and other cases in *Regents of the University of California* v. *Bakke* as involving "determinations of past discrimination by the industries affected" 98 S.Ct. at 2754, there is no indication that particular contractors were any more responsible for such discrimination than was Kaiser for the situation at Gramercy.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Nov. 17, 1977.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees*,

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellants.

No. 76-3266.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In February 1974, Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement with United Steelworkers of America, AFL-CIO (USWA), that significantly altered eligibility for on-the-job training to enter craft positions in all Kaiser plants. In an effort to increase the number of minority workers in the craft families, the 1974 Labor Agreement removed the requirement of prior craft experience for on-the-job training and established an entrance ratio of one minority worker to one white worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the area surrounding each plant. Eligibility for training still rested on plant seniority, but to implement their affirmative action goal it was necessary to establish dual seniority lists: for each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective racial groups.[1] As pre-

[1] The dual lists were maintained solely for eligibility to on-the-job training, and all other seniority benefits were conferred without regard to race.

dictable, black employees have been admitted to Kaiser's on-the-job training program with less seniority than their white competitors. One unsuccessful white bidder working at Kaiser's Gramercy, Louisiana, plant brought this class action on behalf of all persons employed by Kaiser at its Gramercy works who are members of the USWA Local 5702, who are not members of a minority group and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974. Mr. Weber alleged that by preferring black employees with less seniority for admission to on-the-job training, Kaiser and USWA were guilty of unlawful discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2 et seq. (1970). The district court agreed and granted a permanent injunction against further use of the 1974 training eligibility quota. Although the 1974 Labor Agreement applies to all Kaiser plants and similar agreements were enacted through the aluminum industry, these facts pertain only to Kaiser's plant in Gramercy, Louisiana, and this action enjoined the use of the quota at that plant only. Kaiser and USWA, supported by numerous amici curiae,[2] bring this appeal asking us to hold that their training quota, which they say is mandated by valid executive action, does not violate Title VII and is justified by past societal discrimination even in the absence of past employment discrimination here.

Affirmative Relief or Reverse Discrimination?

The case before this court today is unique in that the affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with

[2] Amicus briefs on behlaf of Kaiser and USWA were filed by Reynolds Metal Company, the United States and the Equal Employment Opportunity Commission, and Aluminum Company of America (ALCOA). Great Plains Legal Foundation, the Southeastern Legal Foundation and the Anti-Defamation League of B'nai B'rith filed amicus briefs supporting appellee Weber.

the threats of the Office of Federal Contract Compliance Program (OFCC) conditioning federal contracts on appropriate affirmative action.[3] The case is also unique in that it presents a conflict between affirmative action dictated by the OFCC under Executive Order 11246 and preferential treatment prohibited by Title VII. In *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), Title VII and Executive Order 11246 dictated the *same* response to massive discriminatory practices throughout the steel industry, but the training quota adopted by Kaiser in response to Executive Order 11246 is flatly and literally prohibited by Title VII, § 703(d), which makes it unlawful to limit access to on-the-job training on the basis of race:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1970). Additionally, section 703(a) prohibits racial classifications in general,[4] and section 703(j)

[3] Executive Order No. 11246 requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202(1), 3 C.F.R. 169 (1974), reprinted following 42 U.S.C. § 2000e (1970). The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. *See* 41 C.F.R. 60-20.1 et seq.; 41 C.F.R. 60-2.24.

[4] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

specifies that the Act shall not require preferential treatment.[5] But, of course, the issue here is not whether preferential treatment is required but whether it is forbidden.

When does preferential treatment become illegal reverse discrimination? The answer depends on the law involved, the nature of the affirmative action, and the factual circumstances of the prior discrimination.[6] Federal courts have

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to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

[5] (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970).

[6] *See United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (does redistricting to assure a black majority illegally dilute the voting

agreed that the "make whole" objective of Title VII [7] permits and even requires affirmative relief when necessary to correct continuing inequalities created by past discriminatory employment practices.[8] In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the Court seems to have adopted this circuit's "rightful-place" doctrine,[9] authorizing fictional seniority in order to place the victims of discrimination in as good a place as they would have enjoyed absent discriminatory hiring practices.

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strength of Hasidic Jews?); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (does the grant of fictional seniority to identifiable victims of employment discrimination illegally discriminate against the seniority rights of nonminority employees?); *Bakke v. Regents of University of California*, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977) (does reservation of a certain number of "black" places in the entering class of a state medical school impermissibly discriminate against better-qualified white students who would have been admitted but for the racial quota?); *Chance v. Board of Examiners and Board of Education of New York*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977) (does a quota which requires the percentage of black and Puerto Rican supervisors to reflect the surrounding population discriminate by forcing the dismissal of whites with greater seniority?).

[7] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

[8] This duty is analogous to the equitable duty to eliminate the continuing effects of past discrimination in voting rights, *United Jewish Org. of Williamsburgh, Inc. v. Carey, supra; Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), or to the courts' equitable power to correct continued inequities resulting from intentional segregation of schools. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971).

[9] For a discussion of the "rightful-place" doctrine, *see Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969).

> Obviously merely to require [respondent] to hire the class three victim of discrimination falls far short of a "make whole" remedy. A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors. [footnotes omitted].

Id., 424 U.S. at 767-68, 96 S.Ct. at 1265-1266. The Court made it clear that an award of artificial seniority may not be denied on the ground that it conflicts with the economic interests of other employees.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or its legislative history, to show that Congress intened generally to bar this form of relief to victims of illegal discrimination . . . .

Id. at 774, 96 S.Ct. at 1269.

The Supreme Court has never approved the use of a quota remedy to overcome employment discrimination, but circuit courts have repeatedly sanctioned judicially imposed quotas in certain factual circumstances. Prior to the 1972 amendments to Title VII, our circuit approved such a quota. Local 53, *International Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). *Accord, United States v. International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144, 149-59 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed. 2d 248 (1970); *United States v. Sheetmetal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969). In 1972, a Senate amendment to overturn this case law and forbid the use of quota remedies was rejected two-to-one. Legislative History of Equal Employment Opportunity Act of 1972 at 1017, 1042-74, 1081, 1714-17 (1972). The bill amending Title VII in 1972 provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcom. on Labor of the Senate Com. on Labor and Public Welfare, Legislative History, *supra* at 1844. Since 1972, judicially imposed quota remedies have been widely approved. *United States v. International Union of Elevator Constructors Local 5*, 538 F.2d 1012 (3d Cir. 1976); *EEOC v. Local 638*, 532 F.2d 821 (2d Cir. 1976); *Boston NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *United States v. N. L. Industries, Inc.*, 479 F.2d

354 (8th Cir. 1973); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). But our courts have not been unaware of the dangers of granting preferential treatment on the basis of race:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where compelling need for remedial action can be shown. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity. [footnotes omitted].

Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973). Three circuits have refused to approve racial quotas when the factual circumstances of the past or present discrimination did not dictate such an extraordinary remedy. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Chance v. Board of Examiners, supra; Watkins v. United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Title VII and Executive Order 11246

Quotas imposed to achieve the "make whole" objective of Title VII rest on a presumption of some prior discrimination. There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their "rightful place" in the employment scheme. Several circuits have noted this distinction, holding that quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not. *United States v. Wood, Wire & Metal Lath. International Union Local 40*, 471 F.2d 408, 413 (2d Cir. 1973); *Carter v. Gallagher, supra* at 329; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173 n.47 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed. 2d 367 (1971); *United States v. International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Local 53, International Association of Heat & Frost I. & A. Workers v. Volger, supra* at 1052. *But see EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977); and *Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra* (Executive Order 11246 may provide an alternative justification for racial quotas totally apart from any violation of Title VII).

Courts also have affirmed quota remedies imposed by federal affirmative action programs under the impetus of Executive Order 11246 and comparable state affirmative action programs. *Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra; Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra* (the Philadelphia Plan); *Weiner v. Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004, 90 S.Ct. 554, L.Ed.2d 495 (1970) (the Cleveland Plan); *Joyce v. McCrane*, 320 F.Supp. 1284

(D.N.J.1970) (the Newark Plan); *Southern Illinois Builders Association v. Ogilvie, supra* (the Illinois-Ogilvie Plan). The affirmative action program mandated by 41 C.F.R. § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority and female representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist. The regulation then confuses things mightily by declaring that a goal shall not be considered a device for instituting quotas or reverse discrimination:

> [T]he purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

41 C.F.R. § 60-2.30. Attempts to distinguish a numerical goal from a quota have proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas.[10]

We must judge the legality of Kaiser's training ratio in light of both Title VII, with its "make-whole" objective, and Executive Order 11246, with its mandate for affirmative action that does not itself discriminate.

1974 Labor Agreement

Petitioner Weber complains of Kaiser's dual seniority system that permits black employees to be admitted to on-

[10] While serving in the Labor Department, I helped devise minority employment goals for government contractors.

> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we wished to avoid.

Silberman, *The Road to Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12, col. 4.

the-job training programs ahead of white employees with greater seniority. The offending portions of the 1974 Labor Agreement provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the plants set forth below, and, where necessary, establish certain goals and timetables in order to achieve a desired minority ratio: [Gramercy works listed, among others].
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .

1974 Labor Agreement, Addendum to Art. 9 dealing with seniority. The Joint Committee entered into a Memorandum of Understanding which established a goal of 39% minority representation in each craft family at the Kaiser Gramercy plant.[11]

The one-for-one ratio was then implemented to accomplish this goal.

> In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician* and *general repairman.*

[11] Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. *Weber v. Kaiser Aluminum Corp.*, 415 F.Supp. 761, 764 (E.D.La. 1976).

> Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.
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> It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Weber v. Kaiser Aluminum Corp., 415 F.Supp. 761, 764 (E.D.La.1976).

It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race. In *McDonald v. Santa Fe Trails Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court held that Title VII prohibits racial discrimination against white employees upon the same standards as would be applicable were they Negroes. 427 U.S. at 278-282, 96 S.Ct. at 2577-2578, 49 L.Ed.2d at 500-01. *Accord Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (Title VII prohibits preferences for any groups, minority or majority).

The district court granted injunctive relief against the complained-of quota system on two grounds:

> (1) Courts may establish affirmative action programs as a form of relief in Title VII cases, but when an em-

> ployer and a union voluntarily adopt a quota system this violates Title VII.[12] Quota systems must be imposed with great caution, and *only the judiciary* should be entrusted with fashioning and administering such relief.
>
> (2) Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

We disagree with the district court's reasoning that what courts may force upon employers in the name of Title VII employers and unions may not voluntarily institute. In *United States v. Allegheny-Ludlum Industries, Inc., supra,* which dealt with consent decrees eliminating patterns and practices of discrimination in the steel industry, this court emphasized that voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII. *See also Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970); *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969); *Oatis v. Crown Zellerbach*, 398 F.2d 496, 498 (5th Cir. 1968). But there is strong authority to support the position that courts are not subject to the same restrictions as employers. Section 703, which defines unlawful employment practices, does not

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[12] The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

limit judicial remedies which are governed by the broad language of section 706(g) authorizing "such affirmative action as may be appropriate."

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§ 703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies.

United States v. International Union of Elevator Constructors Local 5, supra at 1019. In *Franks v. Bowman Transportation Co., supra,* the Supreme Court affirmed this view that the definitional section 703(h) does not limit relief otherwise appropriate under section 706(g). We need not now probe into the distinctions between court-ordered remedies and permissible remedies voluntarily hammered out in collective bargaining agreements because we affirm the district court's opinion on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed.

No Prior Discrimination

The district court found, and appellants all but concede,[13] that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant:

> It was also established by the testimony of Mr. English [Kaiser's industrial relations superintendent at its Gramercy plant] that minority employees at the Gramercy plant accounted for only 14.8 percent of the total

[13] Appellants argued that because prior craft experience was formerly required for admittance to on-the-job training and because minorities lacked such experience due to the discriminatory nature of craft unions, indeed there had been some prior discrimination at the Gramercy plant. But only 28 employees were elevated to craft positions through this training program in the ten years prior to 1974; two of these were black. We conclude that this program was so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period. That only three black crafts workers were hired from outside the plant reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser.

> labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that *Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.*
>
> With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. *Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community.* Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen. (emphasis added).

415 F.Supp. at 764. In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d). Title VII outlaws

preferences for any group, minority or majority, if based on race or other impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment "not because he is Black, but because, and only to the extent that, he has been discriminated against." *Chance v. Board of Examiners, supra* at 999. If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.

Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination*. For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title

[14] *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

VII. *Cf. Local 189, United Papermakers & Paperworkers v. United States, supra* at 988. Finding no victims of employment discrimination, the Eighth Circuit reversed a racial hiring quota designed to favor less qualified minority applicants over more qualified white applicants:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

Carter v. Gallagher, supra at 325. Here we do not deal with minority workers less qualified as to skills;[15] presumably each employee seeking admittance to on-the-job training is unskilled for the craft position he or she seeks. Rather, we are confronted with white employees who are more senior than selected black trainees. As noted at the outset, these dual seniority lists, one for black employees and one for white employees, are maintained only for purposes of selecting on-the-job trainees and do not reflect preferential treatment in layoff, recall, transfer assignments, working conditions or any other benefit. But the importance of seniority principles in allocating scarce opportunities such as training for advancement cannot be overlooked.[16] And because

[15] Although ability to perform and physical fitness are factors to be considered in addition to seniority in admitting employees to on-the-job training, the amicus brief of the Equal Employment Opportunity Commission asserts that there was no evidence and no suggestion that any unsuccessful white bidder had greater ability or was more physically fit than the successful black bidders.

[16] Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy & E. Livernash, The Impact of Collective Bargaining on Management, 104-115 (1960). Seniority principles are in-

we deal here solely with an effect of seniority, it is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at the larger universe of all Kaiser operations or indeed about society at large. Seniority is acquired at the plant and operates on a basis neither larger nor smaller than the plant. Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other. Here, unlike in *Franks v. Bowman Transportation Co., supra,* there has been no discriminatory refusal to hire and therefore, here, there is no occasion to restore any employee to his rightful place. *Accord Watkins v. United Steelworkers of America Local 2369,* 516 F.2d 41 (5th Cir. 1975) (a last-hired, first-fired seniority system resulting in the layoff of more blacks than whites is not discriminatory where the individuals who suffered the layoffs were in their rightful place and had never personally experienced prior employment discrimination); *Chance v. Board of Examiners, supra* (a last-hired, first-fired layoff plan which has never been discriminatory may not be suspended to permit black or Puerto Rican supervisors to keep their jobs in preference to a white supervisor with greater seniority). Where admissions to the craft on-the-job training programs are ad-

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creasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore,* 375 U.S. 335, 346-347, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Franks v. Bowman Transp. Co., 424 U.S. at 765, 96 S.Ct. at 1265.

mittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII. We concur in the district court's opinion that however laudable the objective of training minority workers, Title VII clearly proscribes discriminating against majority workers:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocable prohibitions against racial discrimination against *any individual* contained in Sections 703 (a) and (d) of the 1964 Act.

415 F.Supp. at 769 (original emphasis).

Executive Order 11246

Appellants contend that if this racial quota is not sanctioned by Title VII it is sanctioned by Executive Order 11246 and regulations issued by the Office of Federal Contract Compliance (OFCC) mandating affirmative action by all government contractors. Indeed, the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts.

Appellees respond that because Kaiser has actively recruited black craft workers it has complied with the executive requirement of affirmative action and is not guilty of "underutilization." They argue that, properly interpreted, Executive Order 11246 would not require a racial quota in these circumstances and that the OFCC improperly threatened the withdrawal of all federal contracts unless this racial preference was enacted.

Executive Order 11246, with its implied mandate for affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra* at 166-71 (upholding the "Philadelphia Plan"); *see also Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). But executive orders may not override contradictory congressional expressions. In the famous challenge to executive power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson divided executive orders into three categories: (1) those in which the President acts pursuant to express or implied authorization by Congress, as to which his authority is at a maximum; (2) those in which the President acts in the absence of congressional grant of authority and must rely upon his own independent powers; and (3) those in which executive action conflicts with the express or implied will of Congress and is most vulnerable to challenge.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [footnotes omitted].

343 U.S. at 638, 72 S.Ct. at 871. The Third Circuit first validated the Philadelphia Plan as valid executive action and then tested it for conflicts with congressional action, holding that "the Executive is bound by the express prohibitions of Title VII." 442 F.2d at 171-72. The Third Circuit held that the general prohibition against discrimination found in sections 703(a), (h) and (j) did not prohibit the affirmative action imposed by the Philadelphia Plan, *given a finding of prior exclusionary practices* by the six trade unions controlling the work force.

Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition.

We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas—and the short-term and obvious benefits must not blind us to the seeds of racial animus such affirmative relief undeniably sows [17]—Congress has forbidden racial preferences in ad-

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[17] Racial quotas also have been criticized for contributing to the Balkanization of this country by fostering "the dangerous notion that ethnic, racial or religious groups are entitled to proportional representation in all occupations."

In hindsight, one can see this was predictable. We wished

mission to on-the-job training programs, and under the circumstances of this case we are not empowered by the equitable doctrine of restorative justice to ignore that proscription.

AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

Today the Court grapples with the question whether, in a collective bargaining agreement, recognition of race for remedial purposes in employment practices is legal "affirmative action" or illegal "reverse discrimination." The majority does not assert race may never be considered in employment practices or in other racially tense areas. Over ten years ago this Court declared, "The Constitution is both color blind and color conscious."[1] Where I differ from the majority is in my assessment of situations justifying reliance on race as a basis for decision-making. Here, the decision-making was by agreement between management and the union, presumably with the blessing of the legislative and executive branches of government but without benefit of the judicial branch. "Management and the government

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to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice.

Silberman, supra at col. 5.

[1] *United States v. Jefferson County School Board*, 5 Cir. 1966, 372 F.2d 836, 876, *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board v. United States*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103. Continuing, we said: "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." 380 F.2d at 385.

have been our [the unions'] partners in these endeavors [to eliminate discriminatory employment practices] and a great deal of credit must be given to them for the accomplishments of the past ten years." Bredhoff, Affirmative Action in a Declining Economy: Seniority and the Incumbent Majority, in Federal Bar Association, An Equal Employment Opportunity Practice Guide, 118, 119 (1977). The third party beneficiaries of these joint endeavors and agreements are the disadvantaged minorities.

There are three independent legal justifications for these defendants' actions. I must therefore dissent.

I.

The majority accurately and completely presents the facts of this case. A look at the facts from a different point of view, however, is needed to put the defendants' actions in the proper perspective.

This action was brought by a white worker at the Kaiser Aluminum and Chemical Corporation [Kaiser] plant in Gramercy. Gramercy, a town with a population of about 2000, is in St. James Parish, Louisiana, about fifty miles northwest of New Orleans. The Gramercy plant was opened by Kaiser in 1958. Workers at that plant, as in other Kaiser plants, are represented by the United Steelworkers of America [the Union]. St. James and the adjacent parishes had a minority population of about 43 percent at the time of trial. The workforce in those parishes was estimated at 39 percent black.[2] At the time of trial the Kaiser workforce at Gramercy was 14.8 percent black. This was a sharp increase from 1969, when, under federal government pressure, Kaiser began hiring at the gate on a one-to-one black

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[2] The plan in question applied to blacks, other minority groups, and women. However, at Gramercy its application thus far has involved only blacks. For convenience, I use the term "blacks" both in the specific Gramercy situation and in other situations, when a more complete statement would include the other affected groups.

to white ratio. At that time the Kaiser workforce was approximately 10 percent black.[3] Before 1969 the plant had hired unskilled labor at the gate by choosing "the most qualified". There was evidence at the trial from two Kaiser personnel officials that Kaiser had never discriminated by race at its Gramercy plant.

After the 1969 action, Kaiser was still concerned about the low percentage of black craftsmen at its plant. Prior to 1974 only five of the approximately 290 craftsmen at the plant were black. The company made strenuous but unsuccessful efforts to attract more black craftsmen. Pressure from the federal government continued, not just at the Gramercy plant but nationally. Kaiser and the Union discussed the problem in negotiations leading to their 1974 collective bargaining agreement.

Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA.[4]

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[3] The record shows that the Gramercy plant has experienced an increase in black employment of about one percent of their total workforce per year since 1969. Although there was no direct evidence about the percentage of black employees in 1969, extrapolation from those figures produces an estimate that about 10 percent of the Kaiser workforce at Gramercy was black in 1969. Appendix at 123-24, 129-30, 137.

[4] Both companies entered this action as amici curiae, asserting an interest in the litigation because collective bargaining agreements to which they are parties contain similar provisions. ALCOA Brief at 1, Reynolds Brief at 1.

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States v. Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826. The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers. Simultaneously, two consent decrees were filed. The first decree, entered in April 1974, provided:

> All permanent vacancies in apprenticeships and in entry level jobs in lines of promotion containing occupations which in fact lead to craft jobs, shall be filled on a plant-wide basis from among qualified bidding employees . . . In order to meet the implementing ratio [50 percent], seniority factors shall be applied separately to each group for whom timetables are established and to all other employees.

United States v. Allegheny-Ludlum Industries, Inc., Consent Decree I, BNA FEP Manual, 431: 125, 138-39 (1974). Although that decree had not been entered at the time of the agreement in question here, there was testimony that the Kaiser agreement was influenced by the Allegheny-Ludlum negotiations.[5] The Union was a party to both agreements.

II.

The district court rested its decision on two grounds. First, it held that Title VII prohibited completely any privately imposed "quotas". Alternatively, it found this plan

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[5] *See* Appendix at 152 (Thomas Bowdle, Kaiser's Director of Equal Opportunity Affairs), 131 (Dennis English, Industrial Relations Supervisor at Gramercy).

illegal because a court would not have imposed it as a remedy in the circumstances this case presents. The majority properly rejects the first ground. As Judge Gee points out, that position would completely contradict the emphasis Congress laid on voluntary conciliation under Title VII. *See Albemarle Paper Co. v. Moody,* 1975, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Alexander v. Gardner-Denver Co.,* 1974, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147. The majority, however, accepted the district court's second ground, and agreed that this plan would not have been imposed by a court.[6] The Court accepted that conclusion largely on the strength of the district judge's finding that the defendants had not engaged in discrimination in the past at Gramercy. I believe that the majority has judged the defendants' actions by the wrong standard.[7]

The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice

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[6] The majority opinion leaves in question the status of consent decrees. These decrees, like the one approved by this Court two years ago in *Allegheny-Ludlum,* may be entered without extensive fact-finding by the district court. If consent decrees are immune from the majority's test, friendly suits would offer employers an easy way to circumvent the holding of this opinion. If they are not immune, the district court, before accepting the consent decree, will be forced to determine the existence and extent of past discrimination by the defendants.

[7] For reasons detailed below, at 221-222, I believe that the district court's finding that there was no prior discrimination at the Gramercy plant is highly questionable. Even under the majority's standard, the district court must be reversed if that finding is clearly erroneous. Rule 52(a) F.R.Civ.P. My disagreement with the standard the majority applies makes it unnecessary to determine whether this finding falls within Rule 52(a).

suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albemarle Paper Co. v. Moody,* 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L.Ed.2d 280.

Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

The majority's standard will lead to less voluntary compliance with Title VII. Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions, or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the Congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further delayed.

In this case of first impression,[8] we should not hold these defendants to so strict a standard. If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from lia-

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[8] The Supreme Court expressly reserved the question of the validity of "affirmative action programs" when it held that Title VII applied to white male workers. *McDonald v. Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 281 n. 8, 96 S.Ct. 2574, 49 L.Ed.2d 493. The Courts of Appeals have considered and rejected "quotas" in some cases where such relief was sought in the district courts. *See, e.g., Chance v. Board of Examiners*, 2 Cir. 1976, 534 F.2d 993, *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins v. United Steelworkers of America*, 5 Cir. 1975, 516 F.2d 41; *Waters v. Wisconsin Steel Works*, 7 Cir. 1974, 502 F.2d 1309, *cert. denied*, 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823. Several lower courts have considered voluntarily instituted preferential hiring in light of Title VII. *See Cramer v. Va. Commonwealth University*, 1976, E.D.Va., 415 F.Supp. 673; *Reeves v. Eaves*, 1976, N.D.Ga., 411 F.Supp. 531. *Cf. Anderson v. San Francisco School Unified District*, 1972, N.D. Cal., 357 F.Supp. 248 (not governed by Title VII); *Flanagan v. Georgetown University*, 1976, D.D.C., 417 F.Supp. 377 (distribution of scholarship funds, governed by Title VI).

The Supreme Court has held that race may "be considered in formulating a remedy" (*North Carolina State Board of Education v. Swann*, 1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586); in devising remedies, seniority credits for past discrimination (*Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444); in carrying out a prophylactic program to prevent racially disadvantageous outcomes, whether or not they violate the Constitution (*United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229); in avoiding racially disproportionate effects of employment testing practices (*Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280).

bility, would encourage private settlements.[9] If this standard were applied to the case before us, we should reverse.

In spite of the district court's finding that the defendants had not discriminated against blacks at Gramercy, there were arguable violations. The district court made its finding on the basis of testimony from two Kaiser personnel officials. The defendants were never required to rebut a prima facie case, proved statistically, because the statistics were never analyzed by the district court.[10] The reason for the lack of analysis is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Such an analysis would show three possible or probable violations.

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[9] We need not consider in this case the validity of a settlement if actual, as opposed to arguable, discrimination is found by a reviewing court. Even if such a settlement were given no effect, voluntary compliance would be encouraged because the employer would be protected from suits from at least one side.

[10] Usually, a statistical showing of a significant discrepancy between the percentage of minority group members employed and the percentage of the minority group members in the relevant labor market is sufficient to make a prima facie case for a violation. *See International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *Wade v. Mississippi Cooperative Extension Service*, 5 Cir. 1976, 528 F.2d 508, 516-17; *United States v. Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 120. *See also Hazelwood School District v. United States*, 1977, —— U.S. ——, —— - ——, 97 S.Ct. 2736, 2741-2744, 53 L.Ed.2d 768, 777-80; *Dothard v. Rawlinson*, 1977, —— U.S. ——, —— - ——, 97 S.Ct. 2720, 2726-2728, 53 L.Ed.2d 786, 797-98.

First, Kaiser may have discriminated against blacks for unskilled jobs. The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10 percent in 1969. The testimony that Kaiser had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through non-validated tests,[11] or impermissibly subjective processes.[12] The statistics here constituted a prima facie case of discrimination.[13] The district court did not require and the defendants did not present any evidence in rebuttal. Such discrimination would be linked to this case because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority.[14]

Second, the requirement that employees have prior experience in the crafts to enter the limited training program in effect before 1974 may have violated Title VII. Only two

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[11] *See* 42 U.S.C. § 2000e-2(h) (1970); *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 425-36, 95 S.Ct. 2362, 45 L.Ed.2d 280; *James v. Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 334-40; *Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 221.

[12] *See James v. Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 345-47; *Bolton v. Murray Envelope Co.*, 5 Cir. 1974, 493 F.2d 191, 195; *Rowe v. General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359; *United States v. Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 442, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

[13] *Compare Dothard v. Rawlinson*, 1977, —— U.S. ——, ——, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (relevant labor market 36.89 percent female, employees only 12.9 percent female establishes prima facie case).

[14] Compare this with the majority's ground for rejecting societal discrimination as a justification for this program, *supra* at pp. 225-226.

of 28 employees trained under that program were black. While there was evidence that each year of a worker's experience saved the company money, no effort was made to present contrary evidence. The judge simply accepted the statement that prior experience was a business necessity validating the requirement in spite of possible differential effects on blacks and whites. The business necessity defense, however, is narrow. The fact that it may be cheaper or more convenient to use a criterion with divergent impact is not enough to justify its use. *See Watkins v. Scott Paper Co.* 5 Cir. 1976, 530 F.2d 1159, 1168, 1179-83, *cert. denied*, 1976, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *United States v. Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2 652, 662-65; *Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, 989-91 *cert. denied* 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100. *See also Jones v. Lee Way Motor Freight*, 10 Cir. 1970, 431 F.2d 245, *cert. denied*, 1971, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237; *Pettway v. American Cast Iron Pipe*, 5 Cir. 1974, 494 F.2d 211; *Buckner v. Goodyear Tire and Rubber*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir. 1973, 476 F.2d 1287 (three cases where training programs were tested against the business necessity standard). *Cf. E.E.O.C. v. New York Times Broadcasting Service*, 6 Cir. 1976, 542 F.2d 356 (prior experience not a valid requirement when the previous employer prevented the discriminatees from acquiring experience).

The majority tries to avoid this contention by asserting that the program was "too limited in scope" to be characterized as an unlawful practice. The size of the program may be relevant to the weight to be given the statistics describing it, but the small impact of an action provides no immunity. *See McDonald v. Sante Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (two people); *Green v. McDonnell Douglas Corp.*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (one person). If past experience does not satisfy the business necessity require-

ment, and if more whites than blacks had past experience, then a serious question of Title VII liability is raised even if only one position is at stake.

Third, the requirement of any training for some craft jobs may be illegal. While this claim would be the most easily refuted by an employer, no refutation was even attempted. In light of the extremely narrow scope of the business necessity exception, some rebuttal would be necessary. The district judge accepted Kaiser's claims of nondiscrimination. It appears from the record that Kaiser did act in good faith. The company made admirable attempts to recruit black craftsmen, and responded strongly to the problem with its unskilled labor force in 1969. Good faith, however, is not a defense to Title VII. Although the three potential violations discussed above may not make the district court's finding "clearly erroneous" in the sense contemplated by Rule 52(a), F.R.Civ.P., arguable violations clearly existed.

To immunize this plan the defendants should also be required to show that the plan is a reasonable remedy. The similar provisions required by courts in Title VII litigation demonstrate that this relief can be reasonable. *See, e. g., Rios v. Enterprise Association Steamfitters Local 638,* 2 Cir. 1974, 501 F.2d 622; *United States v. Ironworkers Local 86,* 9 Cir. 1971, 443 F.2d 544, *cert. denied,* 1971, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; *Buckner v. Goodyear Tire and Rubber Co.,* 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion,* 5 Cir., 476 F.2d 1287. *Cf. Southern Illinois Builders Association v. Ogilvie,* 7 Cir. 1972, 471 F.2d 680, upholding a similar program under the Executive Order and *United States v. Allegheny-Ludlum Industries, Inc.,* 5 Cir. 1975, 517 F.2d 826, upholding a similar program as part of a consent decree. Three other factors add weight to that conclusion.

First, the plan was negotiated by the employer and the union. The privileges which federal law grants a union as the representative of the covered workers carry with

them the duty to represent in good faith the interests of all the workers. *See Steele v. Louisville & N. Rwy. Co.,* 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (Railway Labor Act); *Ford Motor Co. v. Huffman,* 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Humphrey v. Moore,* 1964, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *Vaca v. Sipes,* 1967, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842. An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a majority of the bargaining unit, serves as a check on the fairness of the plan.[15]

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[15] The Union's influence can be seen in the provisions which give white employees a significant share of these new opportunities. One of the Union's major goals was to provide more advancement opportunities for Kaiser employees in place of workers hired off the street. Appendix at 152.

The Union's duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if that requires assisting some of its members more than others.

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest . . . The Court has also held that a collective bargaining agreement may go further, enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement . . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of "the highest priority"; is certainly no less than in other areas of public policy interests.

Franks v. Bowman Transportation Co., 1976, 424 U.S. 747, 778-79, 96 S.Ct. 1251, 1271, 47 L.Ed.2d 444, 469-70.

Second, the kind of relief given reduced the impact on white workers. Our Court and the Supreme Court have adopted the "rightful place" theory for remedying discrimination. *See International Brotherhood of Teamsters v. United States,* 1977, 431 U.S. 324, 371-377, 97 S.Ct. 1843, 1873-75, 52 L.Ed.2d 396, 437-441; *Local 189, United Papermakers and Paperworkers v. United States,* 5 Cir. 1969, 416 F.2d 980, *cert. denied,* 1970, 397 U.S 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *Gamble v. Birmingham Southern R.R. Co.,* 5 Cir. 1975, 514 F.2d 678, 683; *Bing v. Roadway Express, Inc.,* 5 Cir. 1973, 485 F.2d 441. Other circuits also adopted the rightful place theory as a fair solution. *See, e. g., United States v. Navajo Freight Lines,* 9 Cir. 1975, 525 F.2d 1318; *Reed v. Arlington Hotel Co.,* 8 Cir. 1973, 476 F.2d 721, *cert. denied,* 1973, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (remedy must consider the interests of both groups); *United States v. Bethlehem Steel Corp.,* 2 Cir. 1971, 446 F.2d 652, 659.

The rightful place remedy was originally seen as a compromise among three competing theories: "freedom now", "rightful place", and "status quo". *Local 189,* 416 F.2d at 988. The "freedom now" remedy would have displaced white workers in an effort to eliminate completely the effects of past discrimination. The "status quo" remedy would protect all the expectations acquired by white workers. The "rightful place" theory did not attempt to displace white workers, but required that any future actions be untainted by past discrimination. Since that time, some judges have expressed reservations about ordering relief which put too great a burden on white employees to assist blacks: "robbing Peter to pay Paul". *Franks v. Bowman Transportation Co.,* 1976, 424 U.S. 747, 781, 96 S.Ct. 1251, 47 L.Ed.2d 444 (Burger, C. J., dissenting). *See id.,* 424 U.S. at 787-91, 96 S.Ct. 1251 (Powell, J., dissenting and concurring). The most prominent recent cases where a court refused to order a "quota" remedy involved lay-offs, when such a quota would have meant that whites would have lost their jobs in deference to less senior blacks. *See Chance v. Board of Examiners,* 2 Cir. 1976, 534 F.2d 993, *cert. denied,* 1977, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins v. United Steelworkers of America,* 5 Cir. 1975, 516 F.2d 41; *Jersey Central Power & Light Co. v. IBEW,* 3 Cir. 1975, 508 F.2d 687, *vacated and remanded,* 1976, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812, *on remand,* 3 Cir., 542 F.2d 8; *Waters v. Wisconsin Steel Works,* 7 Cir. 1974, 502 F.2d 1309, *cert. denied,* 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823; *Anderson v. San Francisco School District,* 1972, N.D.Cal., 357 F.Supp. 248; *cf. Kirkland v. New York State Dept. of Correctional Services,* 2 Cir. 1975, 520 F.2d 420 (quotas should not be imposed when identifiable white "victims" of the remedy exist).

In the instant case entirely new rights were created by the plan. None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement. Only those workers with prior experience had been eligible for training, and that pool had been exhausted. No white workers lost their jobs, none had expectations disappointed. Instead, the defendants created entirely new expectations in all the employees, without harming the chances of any Kaiser employee for such training.

Finally, the plan is reasonable because it allows significant white participation. Although the fastest way to remedy past discrimination would have been to institute a training program just for blacks,[16] the Agreement provides

[16] A program of pre-training preparation exclusively for blacks was approved by this Court in *Buckner v. Goodyear Tire and Rubber Co.,* 5 Cir. 1973, 476 F.2d 1287, *aff'g without opinion,* 1972, N.D.Ala., 339 F.Supp. 1108. In a dissenting opinion strenuously attacking the use of quota remedies, Judge Hayes of the Second Circuit stated that training programs exclusively for blacks were legitimate affirmative action. *Rios v. Enterprise Ass'n Steamfitters Local 638,* 2 Cir. 1974, 501 F.2d 622, 637.

that 50 percent of the workers trained will be white. Every Kaiser employee can benefit from the program. It is true that black employees receive more than their white colleagues, but the black employees arguably face racial discrimination at Kaiser's hands—the white workers did not. This white participation makes the plan more reasonable. *See Carter v. Gallagher*, 8 Cir. 1972, 452 F.2d 315 (en banc), *cert. denied*, 1972, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338; *United States v. N. L. Industries*, 8 Cir. 1973, 479 F.2d 354; *Patterson v. Newspaper Deliverers' Union*, 2 Cir. 1975, 514 F.2d 767, 773, 775, *cert. denied*, 1976, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203.

Thus, the 1974 Agreement was a reasonable response to the situation. The defendants were faced with arguable violations of Title VII, federal government pressure, and the impending steel industry settlement. They created an affirmative action plan which aided all Kaiser employees while particularly assisting minority group members. We should not upset their efforts.[17]

III.

The defendants' actions may also be upheld as a proper response to societal discrimination against blacks. The majority avoids the merits of this contention.

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[17] One advantage of the standard I propose is that it takes the reasonableness of the remedy into consideration. The majority is concerned mainly with the existence of past discrimination. Once such discrimination is found, the only question appears to be whether a district court could have imposed such a remedy. A district court's remedial authority in Title VII is extremely broad.

> "The provisions of this subsection [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible."

118 Cong.Rec. 7168 (1972), Section-by-Section Analysis of Equal Employment Opportunity Act of 1972. The standard proposed in this dissent would limit private parties more than § 706(g) limits the judiciary by requiring that the remedy be "reasonable".

The Court does not deny that discrimination by craft unions may have had a major effect on the number of black craftsmen. The majority, however, focuses on the question of seniority. Those affected by the claimed discrimination are now unskilled workers. Because of the lower court's determination that there was no discrimination at Kaiser's Gramercy plant, those unskilled workers have a seniority status which is unaffected by past discrimination. The majority then concludes that past discrimination cannot justify modification of this untainted seniority system to produce the job training ratios used.

> "Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII."

The majority's error is in its last step. It connects the ratio with a change in the seniority system, but that misses the point. Seniority was the system voluntarily adopted by the defendants to allocate scarce opportunities within the black and white employee groups created by this plan. Although seniority is a major tool in modern labor relations, it is a voluntary tool. Unions and employers may agree on other methods of allocation. If, for example, the training program had provided that training opportunities would be divided among able black and white workers by two separate lotteries, the majority's error would be clear. Although the past discrimination against blacks would not in any way effect their lottery numbers, that would have no implications for the validity of the program. The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools is ir-

relevant. Admissions were not "admittedly and purely functions of seniority", they were functions of race first, then seniority. No other situation existed before 1974 because there was no such training program before the 1974 Agreement. The only training program that existed then made admission a function of experience, not seniority. The Court cannot avoid the merits of the defendants' assertion —societal discrimination justifies this plan.

Therefore, I am forced to confront directly the relationship between societal discrimination and Title VII. This is best dealt with by considering two subsidiary questions: May employers compensate employees for societal discrimination, and may race be used as a sign of societal discrimination?

Although the first question does not appear to have been passed upon in the courts, the answer should be "yes". While the government might not be able to require that restorative justice be done, neither should it prevent it. Title VII prohibits only discrimination by race, sex, religion, or national origin. In other respects the discretion of the employee remains. There should be no objection to an employer preferring, for whatever reasons, employees who have faced discrimination. *See* majority opinion at 224-225.

The second question is more difficult. If employers may assist those victimized by past discrimination, may they use race as a proxy for the existence of such discrimination? A broad acceptance of that proposition could have drastic effects. Most of the ethnic groups represented in this country have been discriminated against at one time or another. If Americans of Irish, Italian, Jewish, or German extraction were allowed employment preferences as compensation for undoubted past societal discrimination, Title VII would be eviscerated.

Yet a negative answer to that question would also have serious implications. Acknowledged and damaging past

discrimination would be without a private remedy in employment training. Unless a member of a minority group could show explicit discrimination, the laws that forbid future discrimination by employers would also forbid correction action for past discrimination by others. If a large number of the people involved are not able to show this specific discrimination, then the group will be caught in the cycle caused by discrimination. The future laps of the race will be of equal length, but blacks, Latin-Americans, Asian-Americans, and women will have to start behind the other competitors.

In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities.[18] Yet how many of the excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find crafts jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to

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[18] Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice. *See, e.g., United States v. International Union of Elevator Constructors,* 3 Cir. 1976, 538 F.2d 1012; *Associated General Contractors of Massachusetts v. Altshuler,* 1 Cir. 1973, 490 F.2d 9, *cert. denied,* 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *United States v. Wood, Wire and Metal Lathers,* 2 Cir. 1973, 471 F.2d 408, *cert. denied,* 1973, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398; *Southern Illinois Builders Association v. Ogilvie,* 7 Cir. 1972, 471 F.2d 680; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 3 Cir. 1971, 442 F.2d 159; *cert. denied,* 1971, 404 U.S. 854, 92 S.Ct. 447, 30 L.Ed.2d 367; *Local 53 of International Association of Heat & Frost, etc. v. Vogler,* 5 Cir. 1969, 407 F.2d 1047; *Buckner v. Goodyear,* 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion,* 5 Cir. 1973, 476 F.2d 1287.

The "home town plans", favored by recent Secretaries of Labor as an alternative to the Philadelphia-type plans, have not brought a great improvement. N. Y. Times, October 16, 1977 § 4, at 2, Col. 4.

provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. The result would be a wrong without a remedy.

Some measures to compensate for past discrimination are provided by law currently. The federal government provides by statute a number of preferences for minorities.[19] Closer to this case, employment discrimination law itself imposes requirements on employers which can be viewed only as compensation for racial isolation and its effects. Thus, Title VII's requirement that employment tests must be validated does not require a finding that the employer chose the tests to produce discrimination, nor a finding that the employer produced the conditions that caused lower minority scores on the tests. Instead, it rests on a Congressional purpose not to allow the effects of past discrimination to affect employment decisions when those effects are not job-validated. Similarly, special recruiting efforts aimed at minority groups, often imposed under affirmative action programs,[20] are not conditioned on a showing that the employer intentionally selected the "white" media for recruiting. Instead, it is an effort to compensate for the isolation of minority groups from the mainstream of society, caused at least in part by past discrimination.

This dissent is not the place to explore the contours of a societal discrimination justification for employment or

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[19] *See* Brief of the United States as Amicus Curiae, *Regents of the University of California v. Bakke*, U.S. No. 76-811 (argued Oct. 12, 1977), Appendix A. These programs may be of doubtful constitutionality pending the outcome of *Bakke*.

[20] *See* 41 C.F.R. § 60-2.24(e) (1976).

training preferences. However, when the discrimination is as egregious and recent as that against blacks in the crafts, a reasonable preference in training programs should be upheld.

IV.

A third ground for upholding the defendants' actions is that their program was required by Executive Order 11246, 30 Fed. Reg. 12319. This Executive Order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, starting from the assumption that most disproportionately low employment is the result of discrimination—if not of the contractor involved, then of someone else. I disagree with the majority's view that if the Executive Order purports to legalize this program, the Executive Order is invalid. I believe, however, that the district court would have to determine whether this plan does in fact comport with the requirements of the Executive Order. Therefore, on this ground I would remand the case to the district court for further proceedings.

I do not disagree with the majority's conclusions that if a conflict between the Executive Order and Title VII exists, it should be resolved in favor of Title VII. But that weighty question of the allocation of power between the legislative and the executive branches of government need not be reached. Here, the two are not in conflict.

As the majority points out, affirmative action plans under the Executive Order have been held constitutional. *See E.E.O.C. v. A.T.&T.*, 3 Cir. 1977, 556 F.2d 167, *aff'g*, 1976, E.D.Pa. 419 F.Supp. 1022; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 3 Cir. 1971, 442 F.2d 159; *Southern Illinois Builders Association v. Ogilvie*, 7 Cir. 1972, 471 F.2d 680; *Mele v. Department of Justice*, 1975, D.N.J., 395 F.Supp. 592, *aff'd without opinion*, 3 Cir. 1976, 532 F.2d 747. *Cf. Associated General Contractors of Massachusetts v. Altshuler*, 1 Cir. 1973, 490 F.

2d, 9, *cert denied,* 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L. Ed.2d 307; *Joyce v. McCrane,* 1970, D.N.J., 320 F.Supp. 1184; *Weiner v. Cuyahoga Community College,* 1968, Ohio Ct. of Appeals, *aff'd mem.,* 1969, 19 Ohio St.2d 35, 249 N.E.2d 907, *cert. denied,* 1969, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (similar state plans). For a history of the Executive Order and the response to it in Congress and the courts, *see* Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 752 (1972).

The majority seeks to distinguish *Contractors Ass'n of Eastern Pennsylvania* by stressing the finding there that discrimination had existed in the industry. It should be noted that the parties involved in that case were the contractors; the groups discriminating were the crafts unions. The opinion is in fact directly in point in that respect because it involved actions of the non-discriminating parties.[21]

The legal situation has changed significantly since that opinion. Congress has implicitly exempted the Executive Order from the constraints of Title VII.[22] *See* Comment,

[21] The plaintiffs in that case were a contractors' association and several intervening contractors. The unions, against whom the findings of exclusionary practices was lodged, participated only as amici. Thus, the contractors were in the same position that Kaiser finds itself in here.

[22] The predecessor of this Executive Order was mentioned in the 1964 Act in a section dealing with necessary reports, § 709(d), 42 U.S.C. § 2000e-8(d) (1970). It could be argued that the Order was protected by § 1103, 42 U.S.C. § 2000h-3 (1970), which is a saving clause for then existing authority for federal action.

It could also be argued that the rejection in 1969 of the so-called Fannin Rider demonstrated Congressional approval of the Executive Order. The Comptroller General had declared the Philadelphia Plan illegal on the ground that it lacked standards needed to comply with rules regulating competitive bidding. Senator Fannin introduced a rider to an appropriations bill which would have

The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 751-57 (1972). Congress did so through three actions taken during consideration of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261. At that time the regulations requiring affirmative action in the form of goals and timetables had been in effect for several years. The "Philadelphia Plan", the subject of the *Association Contractors* decision, had been in effect for three years.

The legislation originally presented would have transferred the entire Executive Order enforcement program to the E.E.O.C. Congress eliminated that provision by an amendment offered by Senator Saxbe. In support of the amendment, the Senator stated:

> It has been the "goals and timetables" approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

118 Cong.Rec. 1385 (1972). Another amendment which would have had substantially the same result as the original language was rejected by Congress. 118 Cong.Rec. 3367-70, 3371-73, 3959-65 (1972).

denied all funds for any contracts held illegal by the Comptroller General. The debate made clear that the Philadelphia Plan was the target of the Rider. *See* Comment, The Philadelphia Plan, *supra,* 747-50.

The most telling action was the rejection by the Senate of an amendment to § 703(j) of Title VII, offered by Senator Ervin. The Ervin amendment would have extended that section to read:

> Nothing contained in this title *or in Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual. . . . [Emphasis added.]

118 Cong.Rec. 1676 (1972). This amendment was viewed and debated as an attack on Philadelphia-type plans. *See* 118 Cong.Rec. 1664-65 (1972) (Sen. Javits).[23]

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1844 (1972). With the decision in *Contractors Association* before it, there can be little question that whatever the status of that opinion before 1972, Congress ratified the Philadelphia Plan as consistent with Title VII.

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[23] Senator Javits made clear the connection between the Philadelphia Plan and the Ervin Amendment:

> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans."

118 Cong.Rec. 1665 (1972). The *Contractors Association* decision, which upheld the Philadelphia Plan, was printed in the Congressional Record at Senator Javit's request.

The district court did not pass upon the validity and applicability of the Executive Order. There is a question whether Kaiser's extensive recruiting efforts before 1974 completely satisfied the requirements of the Executive Order. *See* 41 C.F.R. § 60-2.1 *et seq.* Furthermore, the regulations promulgated under the Executive Order disclaim any intent to impose a "quota". 41 C.F.R. § 60-2.30. If the majority is right about the effect of Title VII on this litigation, apart from considerations of the Executive Order, then the disavowal in the regulations of quotas might be read in the same way. Those questions require the consideration of the trial court. Therefore, if I accepted the majority's position that Title VII, apart from the Executive Order, prohibited the conduct in question, I would still vacate the decision and remand it for further proceedings.[24]

V.

"Reverse discrimination" is a question of great current concern. It has spawned an extensive literature, and caused heated debates, some between former allies.[25] It

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[24] If, on remand, the district court were to conclude that the Executive Order was not violated by this plan, then a constitutional question might arise about the validity of this federal action. Of course, I express no opinion on the merits of that constitutional question. *See United Jewish Organizations of Williamsburgh v. Carey,* 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229; *Califano v. Webster,* 1977, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360; *Bakke v. Regents of the University of California,* 1976, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, *awaiting decision,* U.S., No. 76-811 (Argued October 12, 1977).

[25] Among the more interesting treatments of this question are R. Dworkin, Taking Rights Seriously 223-39 (1977); N. Glazer, Affirmative Discrimination (1976); Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv.L.Rev. 1 (1976); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Fiss, Groups and the Equal Protection Clause, 5 J.Phil. & Pub.Aff. 107 (1976); Fiss, A Theory of Fair

is a troubling question. The color blind constitution, so eloquently invoked by the first Justice Harlan, has great appeal. A person's color should not be relevant to most decisions. This Court knows that acceptance of that principle did not come easily. At this stage in the history of eliminating racial discrimination, the use of a racial criterion because it is "benign" pulls us perilously close to self-contradiction. But in spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal. Therefore, I respectfully dissent.

Employment Laws, 38 U.Chi.L.Rev. 235 (1971); Kaplan, Equal Justice in an Unequal World; Equality for the Negro—The Problem of Special Treatment, 61 Nw.L.Rev. 363 (1966).

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Defendants-Appellants.

No. 76-3266

April 17, 1978

* * * * * * * * * * *

On Petitions for Rehearing and Petitions for Rehearing En Banc

(Opinion Nov. 17, 1977, 5 Cir., 1977, 563 F.2d 216)

Before WISDOM,* GEE and FAY, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED[1] and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are also DENIED.

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* Wisdom, J., dissents from the denial of Petition for Rehearing for the reasons stated in his dissenting opinion at 563 F.2d 227-38.

[1] On rehearing it is suggested that our quotation from the panel opinion in *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971) is inappropriate since the en banc court, 452 F.2d 327 *et seq.*, in fact instituted a modified minority hiring quota on rehearing. *Carter*, however, was a case in which past racial discrimination in hiring at the "plant"—in that instance a fire department—was established. Our case is the contrary, and we are not persuaded that the en banc determination there is at variance with our decision here. At all events, we agree with the quotation as applied to our context.

APPENDIX C

UNITED STATES DISTRICT COURT,
E. D. LOUISIANA.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated,

v.

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO.

Civ. A. No. 74-3510

June 17, 1976.

• • • • • • • • • •

JACK M. GORDON, District Judge:

This civil action seeks relief from the effects of alleged illegal discriminatory employment practices by Kaiser Aluminum & Chemical Corporation (hereinafter referred to as "Kaiser"). A trial was scheduled on plaintiffs' request for a preliminary injunction; however, by stipulation of all of the parties the trial was conducted on the merits of plaintiffs' request for a permanent injunction. This opinion, therefore, relates solely to plaintiffs' prayer for injunctive relief against provisions incorporated by Kaiser in its current collective bargaining agreement, as such provisions pertain to Kaiser's employment practices at its plant located at Gramercy, Louisiana. Plaintiffs contend that these provisions establish a quota system which illegally discriminates against non-minority members of the Kaiser Gramercy labor force in violation of Title VII of the Civil Rights Act of 1964.

Brian F. Weber, the individual plaintiff and class representative, has been an employee for Kaiser for approximately seven years, and is presently working as a

laboratory analyst at Kaiser's plant in Gramercy. It appears that Mr. Weber has assumed an active role in the plant's employee-employer relationship inasmuch as he has recently become the chairman of the plant's grievance committee and has also served as a member of the negotiating committee, formed to supply a local supplement to the 1974 Master Labor Agreement, details of which will be discussed later. The plaintiff also is an active member of the United Steelworkers of America Labor Union, AFL-CIO, Local 5702.

In addition to presenting his own claim, Mr. Weber is serving as representative of a class of workers who have similar grievances. This class has been previously defined to include the following employees:

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for one-the-job training programs since February 1, 1974."

Accordingly, the plaintiffs herein consist of Mr. Brian Weber and the class of employees as described above.

The defendants are Kaiser Aluminum & Chemical Corporation, a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of California, and the United Steelworkers of America AFL-CIO (hereinafter referred to as USWA). The USWA is a labor organization created to champion the rights of its members and to bring to bear greater influence upon management during labor negotiations. In the instant case, the USWA is the certified representative of the employees of Kaiser at the Gramercy, Louisiana plant.

On February 1, 1974, Kaiser and USWA entered into an agreement called the "1974 Labor Agreement," which

specified hourly wages of work and conditions of employment. Of particular significance here are the provisions of this collective bargaining agreement relative to minority representation in the trade, craft and assigned maintenance classifications. The pertinent portions of the contract provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:
>
> [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . .
>
> • • • • • •
>
> The term "minority" as used herein shall be as defined in EEOC Reporting Requirements.
>
> (See: Joint Exhibit # 1, "1974" Labor Agreement," pp. 164-165.)

These portions of the contract are foundin an addendum to Article 9 thereof, which deals with "seniority." The "Joint Committee" thereafter entered into a "Memorandum of Understanding"[1] which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each "craft family" at the Kaiser Gramercy plant.[2]

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[1] Joint Exhibit # 2.

[2] Joint Exhibit # 2, p. 8, and Exhibit B thereto.

In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician,* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.

In October, 1974, Kaiser posted additional bids for on-the-job training opportunities, this time in the category of *insulator* and *carpenter.* According to Mr. Weber's testimony, the vacancy in the insulator category was filled by a black employee, since the bid was restricted to blacks only. In the category of carpenter, one black and one white were selected.

It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Kaiser operates many plants throughout the country, but for the purposes of this litigation, we are only concerned with the Labor Agreement as it affects employment practices at the plant located in Gramercy, Louisiana. Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Bap-

tist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. It was also established by the testimony of Mr. English that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.

With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen.

Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U. S.

Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations. The plaintiffs here contend that as the quota system affects the Gramercy plant it unlawfully prefers black employees who have never been subject to prior discrimination by Kaiser.

The defendants' initial contention is that seniority rights are derived from collective bargaining agreements, and, thus, are contractual rights which are not properly the subject of Title VII of the Civil Rights Act of 1964.

This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive collective bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. *Ferrara v. Pacific Intermountain Express Company*, 301 F.Supp. 1240 (N.D.Illinois, E.D. 1969); *Schick v. N.L.R.B.*, 409 F.2d 395 (7th Cir. 1969).

On the other hand, a union or company cannot lawfully bargain for the establishment or confirmation of unlawful discriminatory practices. *Emporium Cazwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975).

Because the plaintiffs contend that the collective bargaining agreement establishes a quota system which is in violation of the Civil Rights Act of 1964, this Court has the authority and jurisdiction to consider their claims even though the quota system was the product of a labor-management agreement.

In its consideration of Plaintiffs' claims under the 1964 Civil Rights Act, this Court will be concerned only with Title VII of such Act which made the elimination of employment discrimination based on race, color, religion, sex or national origin in all industries affecting interstate commerce an avowed objective of the Federal Government. This endeavor is reflected in Section 703(a) of Title VII [42 U.S.C. § 2000e-2(a)], which reads:

> (a) It shall be unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employer, because of such individual's race, color, religion, sex, or national origin.

Discrimination against any individual on the basis of race in any apprenticeship or training program is also specifically prohibited by Section 703(d) [42 U.S.C. § 2000e-2(d)], which provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program

> established to provide apprenticeship or other training.

During the lengthy debates which preceded this legislation, many employers and legislators expressed the fear that the equal employment provisions of the 1964 Civil Rights Act would be construed to require the hiring of minority group personnel on the basis of quotas in order to rectify existing imbalances in employment. To placate these concerns, Section 703(j)[3] was placed in the Act as a compromise, so as to clarify that the equal employment provisions of the 1964 Act were not intended by the Congress to require that preferential treatment be given any individual or group because of an imbalance that might exist with respect to the total number or percentage of persons of any race, color, religion or sex employed in comparison with the total number or percentage of such persons in that area. See generally, *The Civil Rights Act of 1964*, BNA Operations Manual (1964).

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[3] Section 703(j), 42 U.S.C. § 2000e-2(j) reads:

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In this case Kaiser asserts support for the discrimination against its white employees brought about by its aforesaid affirmative action program in the fact that Section 703(j), while providing that the equal employment provisions of the 1964 Act were not to be interpreted as requiring quotas, does not, within the four corners of that subsection, prohibit quotas in employment or training programs.

After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in section 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

Kaiser further seeks to justify the racially discriminatory effects of the quota system which it has adopted by analogizing its affirmative action program to those mandated by United States Courts in response to lawsuits brought by minority group employees under the provisions of Title VII of the Civil Rights Act. It would be well, therefore, briefly to review the history of such court involvement.

After the effective date of the 1964 Act, the courts were deluged with cases alleging employment discrimination, and were left to impose relief commensurate with the nature of the violation. In *Louisiana v. United States,* 225

F.Supp. 353, 393, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709 (1965) the Supreme Court for the first time considered the scope of authority of the judiciary to fashion such relief. Its conclusion was that the courts had not only the power but the duty to render decrees which would "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States, supra,* at 380 U.S. 154, at 85 S.Ct. 822.

The lower courts thereafter began exercising this authority realizing that in some cases affirmative action programs were necessary to effectuate the purpose of the 1964 Act. For example, in the case of *Local 53 of Int. Ass'n. of Heat & Frost Insulators & Asbestos Workers v. Vogler,* 407 F.2d 1047 (5th Cir. 1969), the Court explained:

> "In formulating relief from such practices the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' See *United States v. Louisiana,* E.D.La.1963, 225 F. Supp. 353, 393, aff'd, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at p. 1052.

Additionally, the Court said in *Vogler*:

> "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination. *United States v. Local 189, United Papermakers & Paperworkers,* E.D.La.1968, 282 F.Supp. 39, 45; *Quarles v. Philip Morris, Inc.,* E.D.Va. 1968, 279 F.Supp. 505, 516. See also *Louisiana v. U. S.,* 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at pp. 1052, 1053.

cf. United States v. United Bro. of Carpenters & Joiners of America, Local 169, 457 F.2d 210 (7th Cir. 1972).

As in the *Vogler* case, the courts most frequently exercised their authority to fashion affirmative relief in cases where the employment scheme in question was found to be neutral on its face, but had the effect of perpetuating the effects of past discrimination. See *United States v. Wood, Wire and Metal Lath. Int. v. Loc. No. 46,* 471 F.2d 408 (2d Cir. 1973); *United States v. Central Motor Lines, Inc.,* 325 F.Supp. 478 (W.D.N.C.1970); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).[4]

As the courts began to impose quota systems and other affirmative action programs on a case-by-case basis, however, many employers contested such authority arguing that Sec. 703(j) of the Civil Rights Act prohibited anyone from granting preferential treatment to a given class.

In the case of *United States v. International Bro. of Electrical Workers Local No. 38,* 428 F.2d 144 (6th Cir. 1970), the Court explains the seemingly incongruent relationship between affirmative relief and preferential treatment thusly:

> "When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices." *Int'l Bro. of Electrical Workers, supra,* at p. 149.

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[4] See also, *Carter v. Gallagher,* 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *Contractors Association of Eastern Pennsylvania v. Sec. of Labor,* 442 F.2d 159, 173 n. 43 (3d Cir. 1970), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971).

Accordingly, from the principles espoused in *Louisiana v. United States, supra,* and its progeny, it is well established that the judiciary may establish affirmative action programs as a form of relief in certain Title VII cases without running afoul of sections 703(a), 703(d) or 703(j) of the 1964 Act.

At first blush, it might appear inconsistent that the Act on one hand makes unlawful the establishment by employers of affirmative action programs while on the other hand permits, if not requires, the courts to fashion similar relief in certain cases. Upon reflection, however, substantial distinctions become apparent.

The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

There are other logical and compelling reasons for distinction between employer action and court action. First, because relief of this nature should be imposed with extreme caution and discretion, and only in those limited cases where necessary to cure the ill effects of past discrimination, the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. Further, the administration of such relief by the courts tends to assure that those remedial programs will be uniform in nature and will exist only as long as necessary to effectuate the purposes of the Civil Rights Act.

Even though the courts may establish affirmative action relief, they have been reluctant to impose quota systems like that in question here, for they recognize that such programs are at best inequitable. In a very recent case, *Kirkland v. New York,* 520 F.2d 420 (2d Cir. 1975), the court made the following observation:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." *Kirkland, supra* at p. 427.

Thus, the courts are cognizant of the undesirable effects accompanying quota systems, and, accordingly, have established such systems only in factually limited circumstances. For example, the courts in recent decisions have refused the invitation to impose such affirmative action plans without first being convinced that those seeking relief have themselves been the subject of past discrimination. In the case of *Watkins v. United Steel Workers of Am., Local No. 2369,* 516 F.2d 41 (5th Cir. 1975), the Fifth Circuit Court of Appeals held that even though the use of a seniority system to lay off employees may result in the discharge of more blacks than whites, the discharge system was not discriminatory where the individuals who suffered the layoffs were in their "rightful place"[5] since they had never personally experienced prior employment discrimination.

The Court in *Watkins* said, "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites." *Watkins, supra,* at p. 46.

In another very recent case, *Chance v. Board of Examiners of the Board of Education of the City of New York,* 534 F.2d 993 (2d Cir. 1976), the Court analyzed the imposition of a quota system the effect of which was to require a senior, more experienced white employee to stand aside

[5] For a full discussion of the "rightful place" theory see *United States v. Local 189, United Papermakers & Paperworkers,* 282 F. Supp. 39 (E.D.La.1968) aff'd 416 F.2d 980 (5th Cir. 1969).

and forego the seniority benefits guaranteed him by the New York Education Law, solely because a younger, less experienced employee was black. The *Chance* case was a civil rights class action which began in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City School System. The United States District Court for the Southern District of New York directed the Board of Education of the City of New York to excess supervisory personnel in accordance with a formula imposing racial quotas upon the excessive process. Excessing rules are very similar to the principles of seniority inasmuch as excessing rules provide, in brief, that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. As the Court of Appeals recognized, the inevitable consequences of the racial quotas preventing the excessing of a black or Puerto Rican are that a white person with greater seniority must be excessed in his place. In reversing the District Court's decision, the Second Circuit explained:

> "Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII, and they are in accord that this Act was not intended to invalidate bona fide seniority systems. *Waters,* supra, 502 F.2d at 1318; *Jersey Central, supra,* 508 F.2d at 710. Our brothers in the Fifth Circuit say that 'regardless of what that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.' " *Chance, supra,* at 997.

The Court further stated that if a minority worker had been kept from his "rightful place" on the seniority lists

by the use of discriminatory examinations, or other discriminatory practices, he may in some instances, be entitled to preferential treatment. Reasoning, however, that such preferential treatment should be given not because the man is black, but because he had been discriminated against, the Court observed:

> "The 'freedom now' and 'rightful place' doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. *Local 189, United Papermakers v. United States, supra,* 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the later involves only the filling of vacancies. We have followed the 'rightful place' doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. *United States v. Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971)." *Chance, supra,* at 999.

Since the evidence received during the trial of the case *sub judice* established that the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their "rightful place" in the plan. Accordingly, a plant-wide seniority system at Kaiser's Gramercy plant would have adequately ensured that its minority employees were receiving those benefits commensurate with their seniority. Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority. Thus, applying the rationale developed in *Watkins* and *Chance* to the facts of this case, the Court must conclude that an affirmative action quota system such as that imposed by Kaiser would have

been inappropriate for the Gramercy plant, even if defendants were correct in their contention that employers have some right to discriminate by analogy to those cases where courts have ordered affirmative relief programs.

In reaching its conclusion that the discriminatory provisions of Kaiser's affirmative action program violate specific proscriptions of Title VII of the 1964 Civil Rights Act, this Court is well aware that similar programs have been adopted, before and after enactment of the 1964 Act, by many employers in the private and public sector, often because of pressure from various agencies of the Executive Branch of the United States Government. Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the 1964 Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary. Numerous policy decisions of monumental importance to the

nation necessarily would have to be made in creating exceptions to Sections 703(a) and (d) of the 1964 Act, and the type of Congressional scrutiny and public debate such as that reflected in the legislative history of the 1964 Act would ensure that competing interests could be balanced in a fashion consistent with the democratic processes pursuant to which the 1964 Act itself was adopted.

Accordingly, judgment will be entered in favor of plaintiffs, and against defendants, granting a permanent injunction restraining defendants from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-23

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*,

v.

BRIAN F. WEBER, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14, 1978.

/s/ J F P, Jr.
Associate Justice of the Supreme Court of the United States

By: J D A

Dated this 7th day of July, 1978.

APPENDIX E

42 USC § 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

• • •

SENIORITY OR MERIT SYSTEM; QUANTITY OR QUALITY OF PRODUCTION; ABILITY TESTS; COMPENSATION BASED ON SEX AND AUTHORIZED BY MINIMUM WAGE PROVISIONS

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges or employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

• • •

PREFERENTIAL TREATMENT NOT TO BE GRANTED ON ACCOUNT OF EXISTING NUMBER OR PERCENTAGE IMBALANCE

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race,

color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX F

PRESIDENTIAL DOCUMENTS

Title 3—THE PRESIDENT

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employ-

ment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and

shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective con-

tractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the

Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VI of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry

out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly

notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction

contracts paid for in whole or in part with funds obtained from the the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such

application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and II of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE,

September 24, 1965.

[F.R. Doc. 65-10340; Filed, Sept. 24, 1965; 4:18 p.m.]

APPENDIX G

41 Code of Federal Regulations

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

SUBPART A—GENERAL

Sec.

60-2.1 Title, purpose and scope.

60-2.2 Agency action.

SUBPART B—REQUIRED CONTENTS OF AFFIRMATIVE ACTION PROGRAMS

60-2.10 Purpose of affirmative action program.

60-2.11 Required utilization analysis.

60-2.12 Establishment of goals and timetables.

60-2.13 Additional required ingredients of affirmative action programs.

60-2.14 Compliance status.

SUBPART C—METHODS OF IMPLEMENTING THE REQUIREMENTS OF SUBPART B

60-2.20 Development or reaffirmation of the equal employment opportunity policy.

60-2.21 Dissemination of the policy.

60-2.22 Responsibility for implementation.

60-2.23 Identification of problem areas by organizational units and job groups.

60-2.24 Development and execution of programs.

60-2.25 Internal audit and reporting systems.

60-2.26 Support of action programs.

SUBPART D—MISCELLANEOUS

60-2.30 Use of goals.

60-2.31 Preemption.

60-2.32 Supersedure.

AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCES 36 FR 23152, Dec. 4, 1971, unless otherwise noted.

SUBPART A—GENERAL

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper

commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an effected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[42 FR 3461, Jan. 18, 1977]

§ 60-2.2 Agency action.

(a)(1) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or

through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor-bidder nonresponsible and so notify the contractor, the Director, and the compliance agency unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Director may require the compliance agency to develop the investigation or compliance review further or to conduct additional conciliation: *Provided,* That during any pre-award conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further,* That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause, the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26. Such request

for initiation of enforcement proceedings shall be sent to the Director no later than the date of issuance of the second nonresponsiblity determination.

(c) (1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, the compliance agency representative or the representative of the Office of Federal Contract Compliance Programs, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance Programs of such fact. Whenever administrative enforcement is contemplated, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation or opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program

within 30 days, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas

within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit,

or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors;

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974; 39 FR 25654, July 12, 1974]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preferences for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail his reason for a lack of a goal.

(l) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

[36 FR 23152, Dec. 4, 1971, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the

G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and work-study programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

SUBPART D—MISCELLANEOUS

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 published in the FEDERAL REGISTER on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3266

D. C. Docket No. 74-3510 "I"

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and United Steelworkers of America, AFL-CIO,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GEE and FAY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 17, 1977

WISDOM, Circuit Judge, dissenting.

ISSUED AS MANDATE: June 5, 1978

No.

Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-436

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 563 F.2d 217. The opinion of the district court (App. D, *infra*) is reported at 415 F. Supp. 761 (E.D. La.).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1977 (App. B, *infra*). Timely petitions for rehearing were denied on April 17, 1978 (App. C, *infra*). On July 7, 1978, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including September 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of proof of past employment discrimination, an employer and a union may adopt a program, based in part upon a racial criterion, to increase the proportion of black employees in skilled craft jobs at one of the employer's plants.

STATEMENT

1. Kaiser Aluminum & Chemical Corporation operates a plant in Gramercy, Louisiana, located along the Mississippi River about halfway between New Orleans and Baton Rouge. As of 1974, although the local population was approximately 46 percent black and the workforce 39 percent black, less than 15 percent of the employees at the Gramercy plant were black (Tr. 50-51).[1] Moreover, at the beginning of

[1] The percentage of black employees in the plant at large had increased by approximately one percent per year since 1969. In that year, at the urging of the Office of Federal Contract Compliance, Kaiser had begun hiring approximately 50 percent minority workers for the unskilled non-craft jobs at the plant (Tr. 79-80, 85-86, 93).

1974, there were only five black employees among the 273 skilled craft workers at the plant—less than two percent (Tr. 54; Kaiser Exhibit 3).

Kaiser officials attributed the disparity between the percentage of black employees in the local workforce and the percentage of black employees holding skilled craft jobs at the Gramercy plant to the lack of training opportunities for blacks, caused in large part by discrimination in the building trades industry. Prior to 1974, Kaiser had filled almost all its craft jobs by hiring persons from outside the plant who met the company's experience and qualification requirements. Because blacks had not been able to participate in substantial numbers in training and apprenticeship programs in the building trades industry and other craft industries, there were not many black craftsmen available who could meet Kaiser's experience requirements (Tr. 56-57, 67-68, 102-103).

In late 1973, in anticipation of the upcoming collective bargaining negotiations with the United Steelworkers of America, the union that represents most of the employees at Kaiser's plants, Kaiser officials met with Steelworkers representatives to discuss the problem of the low number of minority employees in craft positions. As one Kaiser official characterized the discussions, "[t]here was certainly a concert of opinion that there was a problem, and one that had to be solved, so that [there] were preparatory discussions, prior to the negotiations, that there had to be some solution arrived at to change the situation" (Tr. 100-101).

In early 1974, Kaiser signed a nationwide collective bargaining agreement with the Steelworkers. The company and union issued a joint "memorandum of understanding" at that time, in which they stated that the participation of minority employees in skilled craft positions at Gramercy and certain other Kaiser plants "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions" (Joint Exhibit 2, p. 7). To achieve this goal, the 1974 collective bargaining agreement provided that at least half the employees hired or assigned to training programs for craft jobs in the designated plants should be minority group members unless insufficient qualified minority candidates were available at the time. That selection ratio would be maintained at each plant, according to the agreement, until the minority representation in the craft jobs was equivalent to the minority representation in the labor force from which the plant recruited (App. D, *infra*, p. 63a-64a). Similar minority-oriented training programs were established throughout the aluminum industry as well as in the can industry (Tr. 53, 103). These programs mirrored a provision in the 1974 nation-wide steel industry consent decree, to which the Steelworkers union was a party. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 836, 880 n.87 (C.A.5), certiorari denied, 425 U.S. 944.

2. Respondent Weber is a white employee at Kaiser's Gramercy plant. In April 1974 the Gramercy plant announced that it was offering on-the-job

training programs for three skilled craft jobs, in accordance with the terms of the 1974 collective bargaining agreement. Bidding for the programs was open to all employees in the plant, with eligibility to be determined on the basis of plant seniority. To implement the 50 percent minority participation goal, however, black and white applicants were selected on the basis of their relative seniority within each racial group (App. A, *infra*, p. 2a). Thus, the five most senior black applicants and the four most senior white applicants were selected for the April 1974 programs. Weber applied for all three programs but was not selected. Two of the black applicants who were selected had less plant seniority than Weber (Joint Exhibit 3, p. 1; Tr. 11-12).

For the year 1974, the company offered a total of 13 training positions for skilled craft jobs. Selections were made on an alternating basis between the most senior black and white employees bidding, so that by the end of the year the company had selected seven black employees and six white employees for the 13 positions. In each instance, successful black bidders were junior in plant seniority to some unsuccessful white bidders (App. A, *infra*, p. 2a; Joint Exhibit 3). A Kaiser official stated that if selections had been made strictly by seniority, "there would be very few blacks that would get into any of the crafts for quite a while" (Tr. 69). During the same year, the company hired 22 craftsmen from outside the plant. All but one of those employees were white (Tr. 59).

Weber filed a complaint in the District Court for the Eastern District of Louisiana, alleging that the

use of a racial criterion to fill the craft training vacancies violated Sections 703(a) and (d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), (d). The district court certified a plaintiff class consisting of all non-minority employees at Gramercy who had applied for or were eligible to apply for the on-the-job training programs (App. D, *infra*, p. 61a; Tr. 14-15).

The two Kaiser officials who testified at trial denied that Kaiser had discriminated in hiring or promotion, but they stated that the company was aware of its vulnerability to private or governmental lawsuits under Title VII or to coercive sanctions under Executive Order 11246, 30 Fed. Reg. 12319 (Tr. 55, 77-78, 101-102). Kaiser and other aluminum companies had been defendants in Title VII litigation with respect to plants similar to Gramercy, and Kaiser and the Steelworkers were aware of the government's industry-wide lawsuit against the steel industry, which had led to a consent decree costing the steel companies millions of dollars in back pay awards (Tr. 87, 108-109). See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (C.A. 5), certiorari denied, 425 U.S. 944.

Kaiser decided to take voluntary affirmative action, according to one of the company witnesses, because "we looked at our problem, which was that we had no blacks in the crafts, to speak of * * * and we realized that if we did not do something on our own, then the Government was going to do it to us * * * [and] whatever their remedy is * * * it's one heck of

a lot worse than something we can work at ourselves" (Tr. 87-88). Another company witness testified that during reviews of Kaiser's compliance with the affirmative action obligations of Executive Order 11246, the Office of Federal Contract Compliance, through two of its compliance agencies, had pressured Kaiser to increase the number of its minority employees in the craft jobs. He stated, "I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing" (Tr. 101-102). The Steelworkers favored voluntary affirmative action, according to the company witnesses, and the union particularly favored the on-the-job training programs because they offered incumbent employees of both races a new means of access to the skilled craft jobs (Tr. 58, 71, 89, 108).

3. The district court held that the on-the-job training plan violated Title VII. In the court's view, affirmative action programs could be imposed as a form of relief only by the courts and then "only in those limited cases where necessary to cure the ill effects of past discrimination" (App. D, *infra*, p. 73a). The court found that Kaiser's decision to bargain for on-the-job training programs was "prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern with rules and regu-

lations issued by the Office of Federal Contract Compliance (OFCC) * * *" (*id.* at 65a). The primary motivations for instituting the programs, the court found, were "satisfying the requirements of OFCC, and avoiding vexatious litigation by the minority employees * * * " (*ibid.*). Yet because the court concluded that the black employees selected for the on-the-job training programs "had never themselves been subject to any unlawful discrimination during hiring," it held that the "affirmative action quota system" used at the Gramercy plant was unlawful even if employers could legitimately utilize such programs to remedy proven past discrimination (*id.* at 77a). The court granted an injunction barring Kaiser and the Steelworkers "from denying plaintiffs, Brian F. Weber and all other members of the class access to on-the-job training programs on the basis of race" (App. E, *infra*).

4. The court of appeals affirmed, one judge dissenting.[2] The court rejected the district court's conclusion that only courts could institute remedial programs involving racial quotas, but it agreed with the district court that on the facts of this case, the use of racial quotas in the selection of those eligible for on-the-job training programs violated Title VII. The court noted that the district court found that Kaiser "has not been guilty of any discriminatory hiring or

[2] The United States and the Equal Employment Opportunity Commission did not participate in the District Court, but filed a brief as *amici curiae* in the court of appeals. The United States and the Equal Employment Opportunity Commission then intervened in the case for purposes of filing a petition for rehearing and for any further proceedings in the case.

promotion at its Gramercy plant" (App. A, *infra*, p. 17a). In the absence of prior discrimination, the court held, "a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII" (*id.* at 18a). Since, in the court's view, a racial preference would be permissible only if it were designed "to restore employees to their rightful places within a particular employment scheme" (*id.* at 20a), the court held that such preferences could not be employed in response to general societal discrimination, absent proof of discrimination by the employer in question.

The court of appeals also rejected the contention that the Executive Order provides the authority for the company's training programs, on the ground that the Executive Order cannot sanction affirmative action programs that would otherwise be contrary to Title VII. If the Executive Order purports to require a racial quota for admission to on-the-job training by Kaiser, the court held, the Executive Order must give way to the congressional prohibition contained in Title VII, at least in the absence of any prior discrimination in hiring or promotion (*id.* at 25a).

In dissent, Judge Wisdom offered three justifications for Kaiser's program. First, he argued that to condition affirmative action on proof of past discrimination would chill voluntary compliance with the equal employment opportunity goals of Title VII. Instead, he contended that employers and unions should be permitted to institute reasonable voluntary remedies for arguable violations of Title VII. In light

of the low percentages of minority participation in the general workforce and in the craft jobs at the Gramercy plant, as well as the prior practice of requiring previous experience as a prerequisite for the craft positions, he concluded that there was sufficient proof on the record of arguable Title VII violations (*id.* at 33a-37a). Second, Judge Wisdom stated that employers and unions should be permitted voluntarily to take steps to remedy societal discrimination against minority group members (*id.* at 43a-47a). Third, he concluded that independent authority for the affirmative action program might be found in the Executive Order, although he stated that he thought a remand necessary to determine whether the program was consistent with the Executive Order and, if so, whether the federal authorization of such action raised any constitutional questions (*id.* at 48a-52a).[3]

REASONS FOR GRANTING THE WRIT

This case raises questions of great importance about the permissible scope of voluntary affirmative action under Title VII. The court of appeals held that an employer and a union may not agree to take job actions based in part on a racial criterion unless they can prove that the employer engaged in unlawful

[3] Judge Wisdom did not disagree with the majority that any conflict between the Executive Order and Title VII should be resolved in favor of Title VII. In this case, however, he found no conflict between the two (App. A, *infra*, p. 48a).

discrimination. We believe that this ruling is incorrect. Moreover, if permitted to stand, the decision of the court of appeals can be expected to chill voluntary affirmative action programs not only in the Fifth Circuit but throughout the country.

1. In our view, Title VII permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question. Where there is no reasonable ground for concluding that the employer may have discriminated in the past, a race-conscious program may, as the court of appeals stated, "lose its character as an equitable *remedy* and * * * be banned as an unlawful racial *preference* prohibited by Title VII" (App. A, *infra*, p. 18a). On the other hand, because of the disincentives to an employer of proving its own Title VII violation and because of the difficulties of determining, without litigation, whether an employer may have violated the statute, it is unduly restrictive to permit the employer and union to adopt an affirmative remedy only if they can establish in court that the employer has been guilty of discrimination.

a. In enacting Title VII, Congress expressed a clear preference for voluntary compliance as a means of combating employment discrimination. See 42 U.S.C. 2000e-5(b), (f)(1); *Regents of the University of California* v. *Bakke*, No. 76-811, decided June 29, 1978, slip op. 41 n. 38 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. That preference is found-

ed upon sound public policy considerations. Employers and unions are far better situated than courts or governmental agencies to fashion methods for remedying past discrimination while minimizing the disruption of the business and accommodating, to the greatest extent possible, the interests and expectations of other employees. *Cf. Furnco Construction Corp.* v. *Waters*, No. 77-369, decided June 29, 1978, slip op. p. 10. Voluntary compliance avoids the expense, delay and rancor often associated with complex Title VII litigation, and it reduces the need for elaborate governmental monitoring and enforcement efforts.

As Kaiser and the Steelworkers were aware, the percentage of minority employees in Kaiser's skilled craft positions was so low in relation to their proportion of the overall workforce that they could reasonably conclude that Kaiser might be found liable in a Title VII proceeding. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-331; *Hazelwood School District* v. *United States*, 433 U.S. 299, 308-309 & n. 14; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-343 & nn. 20, 23. Faced with possible violations of Title VII, Kaiser could have refused to take corrective action and instead have allocated its resources to defend itself in litigation. Had Kaiser chosen that course, and had its defense proved unsuccessful, a court could have imposed the kind of affirmative action program here at issue as a remedy for discrimination, as the court of appeals acknowledged (App. A, *infra*, p. 10a). Even without a finding or admission of discrimination, the same program

could have been incorporated into a consent decree in settlement of the litigation, as the court of appeals also acknowledged (*id.* at 16a). Instead, however, the program was instituted voluntarily without the necessity of litigation, contested or uncontested. Moreover, Kaiser and the Steelworkers designed the program so as to avoid undue adverse effects on white employees. No white employee was displaced from a job, nor were the existing expectations of any white employee diminished. Because of Kaiser's previous requirements that skilled craft job applicants have prior experience in the craft, those jobs had been inaccessible to a large number of employees, including respondent Weber. While the new training programs favored some black employees with less plant seniority than competing white employees, the programs created new opportunities for both groups.

The decision of the court of appeals that an employer can take such action only if it admits and proves that it has violated Title VII will plainly discourage voluntary compliance. An admission of discrimination would invite suits for substantial backpay awards and other relief. In light of that prospect, few employers could be expected to take voluntary affirmative action, even if their prior discriminatory conduct is clear-cut.

As Kaiser's recent experience demonstrates, this dilemma is not merely hypothetical. At the same time that Kaiser was defending its affirmative action efforts in this case, it was also defending employment

discrimination suits brought by black employees of its two other Louisiana plants. Litigation arising from its Baton Rouge plant was settled by a consent decree requiring Kaiser to pay $255,000 to the plaintiff class. *Burrell* v. *Kaiser Aluminum & Chemical Corp.*, Civ. Action No. 67-86 (M.D. La.), consent decree filed February 24, 1975. And the Fifth Circuit has recently held that the plaintiffs in the suit arising from Kaiser's Chalmette, Louisiana, plant established a *prima facie* case of discrimination against blacks in hiring for craft positions on the basis of statistics strikingly similar to those of the Gramercy plant before the 1974 training program was instituted. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374.

In this case, the court of appeals focused on the district court's finding that none of the minority employees who were benefitted by the on-the-job training program had been victims of discrimination in hiring or promotion. In light of this finding, the court concluded that the on-the-job training program could not properly be remedial and that it therefore violated Title VII. Even if the district court's finding were unimpeachable, however, that should not end the matter.[4] The district court should

[4] We question whether a finding of no discrimination in this context should be accorded much weight. None of the three parties in the district court had any incentive to establish that the company had discriminated against blacks. The district court based its finding of no discrimination on cursory and largely self-serving testimony by company officials whose assertions with respect to the company's policies of non-discrimination were understandably not challenged by either of the other parties. There was no evidence, for example, of the job-relatedness of any of the selection devices used by Kaiser in hiring for the craft positions at the Gramercy plant. Compare *Parson* v. *Kaiser Aluminum & Chemical Corp.*, *supra*, 575 F.2d at 1381-1382.

have inquired whether the employer and union could reasonably have believed that the facts with respect to the craft jobs at the Gramercy plant could have supported a *prima facie* finding of discrimination by the employer or the employer and the union together. If so, the court should have held that a remedial plan reasonably directed to curing the effects of the apparent violation should be upheld under Title VII.

b. The affirmative action obligation imposed on Kaiser and other federal contractors by Executive Order 11246 further supports the lawfulness of voluntary affirmative action programs adopted by agreement between unions and employers.

The legislative history of Title VII demonstrates that both at the time the Act was passed and at the time of the 1972 amendments to the Act, Congress was aware of, and approved of, the affirmative action requirements of the Executive Order and its predecessors. The original Act explicitly contemplated the continuation of the Executive Order program, which was then administered under Executive Order 10925, 26 Fed. Reg. 1977, the direct predecessor of Executive Order 11246. See *Contractors Association of Eastern Pennsylvania* v. *Schultz*, 442 F.2d 159, 171 (C.A. 3), certiorari denied, 404 U.S. 854.

At the time Title VII was amended in 1972, the Secretary of Labor's regulations requiring affirmative action under the Executive Order in the form of goals and timetables for minority participation had been in effect for several years. See 41 C.F.R. 60-1.40, and Part 60-2 (Order No. 4) In addition, Congress

was aware of both the "Philadelphia Plan" for affirmative action and the Third Circuit decision upholding it, *Contractors Association of Eastern Pennsylvania* v. *Schultz, supra.* See 118 Cong. Rec 1664-1665 (1972). Yet while enacting the 1972 amendments to Title VII, Congress "explicitly considered and rejected proposals to alter Executive Order 11246 and the prevailing judicial interpretations of Title VII as permitting and in some circumstances requiring, race conscious action." *Regents of the University of California* v. *Bakke, supra,* slip op. at 30 n. 28 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.). See Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 723, 747-757 (1972).

This legislative history demonstrates that Congress intended the concept of affirmative action, as employed under the Executive Order program, to be consistent with Title VII, not in conflict with it. While accepting the premise that the Executive Order cannot override Title VII if the two conflict, we agree with Judge Wisdom that in light of the legislative history of Title VII, affirmative action taken in response to the obligations of the Executive Order can co-exist with Title VII.

In this case the record reflects—and the district court found—that Kaiser and the union instituted the on-the-job training programs in large measure because of concern about possible action by the Office of Federal Contract Compliance, which enforces the Executive Order program. It is not clear from the

record, however, whether the action taken by Kaiser and the Steelworkers was consistent with the requirements of the Executive Order. For that reason and for the reasons set forth below, we agree with Judge Wisdom that that question should be resoved by the district court on remand.

2. Although we firmly believe that the decision of the court of appeals was erroneous and would ordinarily warrant plenary review by this Court, we believe that the better course for the Court to follow in this case is to vacate the judgment of the court of appeals and remand the case to that court for reconsideration in light of *Regents of the University of California* v. *Bakke, supra.*

The decision of the court of appeals was rendered prior to this Court's decision in *Bakke,* and although the two cases deal with somewhat different questions, the analysis in *Bakke* has an obvious bearing on the question presented here, both by analogy and by virtue of the extensive treatment of Title VII cases in the several opinions in that case. The applicability of *Bakke* is of particular significance here, since this case was tried on a very limited record[5] and on broad theories of liability and defense. The opinions in *Bakke* provide guidance as to the kinds of facts that would be relevant to, and perhaps dispositive of, the legality of Kaiser's affirmative action program on narrower grounds. Because this case was tried and decided on appeal before *Bakke,* those facts were not developed in the record.

[5] Only four witnesses testified in the course of the one-day trial. The rest of the evidence consisted of seven exhibits and a short stipulation.

Bakke teaches that the legality of an affirmative action program may turn on the presence of governmental findings of discrimination by the employer and the degree of governmental participation in developing the affirmative action program. See *Regents of the University of California* v. *Bakke*, *supra*, slip op. 31-33 (Opinion of Powell, J.); slip op. 1, 29-31 (Opinion of Brennan, White, Marshall and Blackmun, JJ.).

The record in this case does not reveal the full extent of the role played by the OFCC in the development of Kaiser's on-the-job training programs. The OFCC made specific findings and recommendations concerning craft jobs at Gramercy, but these findings were not put into the record. In 1971, following a complete compliance review, the OFCC notified Kaiser that its craft employment practices at Gramercy did not conform with the OFCC's anti-discrimination requirements. The OFCC found that none of the 246 craftsmen then employed at Gramercy were black and that Kaiser did not actively recruit blacks for craft positions. The OFCC recommended at that time that a training program should be established and that at least 50 percent of the new craft employees should be black.[6] Moreover, in the course of a subsequent review in 1973, the OFCC found that Kaiser had waived its prior experience requirement for whites but not for blacks, who had applied for craft positions.[7] Thus, a reopening of the

[6] We have lodged a copy of the 1971 findings and recommendation with the Clerk of the Court.

[7] We have lodged a copy of the 1973 report with the Clerk of the Court.

record might well indicate that the affirmative action program involved here could be upheld because an "administrative body charged with the responsibility made determinations of past discrimination by the [industry] affected and fashioned [a remedy] deemed appropriate to rectify the discrimination." *Regents of the University of California* v. *Bakke*, *supra*, slip op. at 32 (Opinion of Powell, J.).

A remand would also permit one of the parties or an intervenor to seek to prove prior discrimination against blacks at the Gramercy plant. In the Title VII litigation involving Kaiser's nearby plant in Chalmette, Louisiana, the black plaintiffs established a *prima facie* case of discrimination after proving that Kaiser had employed a variety of written tests and educational requirements of dubious validity in selecting candidates for the plant's craft jobs. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, *supra*, 575 F.2d at 1381-1382, 1389-1390. The record in this case reveals similarly low participation by blacks in craft jobs at the Gramercy plant, but it fails to disclose what hiring criteria were used in filling those jobs. A more complete record could establish whether similar—and highly dubious—entrance qualifications had been employed for skilled craft positions at the company's Gramercy plant.[8]

[8] In *Cramer* v. *Virginia Commonwealth University*, C.A. 4, No. 76-1937, decided August 15, 1978 (*en banc*), which also involved the legality of an affirmative action program under Title VII and was also tried before *Bakke*, the court of appeals vacated and remanded with instructions to re-open the record, when it appeared that there was extra-record evidence that could narrow the broad questions presented on appeal.

In sum, there is substantial evidence not now in the record that could significantly narrow the question presented in this case. Because of the importance of the question and the apparent relevance of the *Bakke* case, we believe that an appropriate disposition would be to vacate the judgment of the court of appeals and remand the case for reconsideration. On remand before the district court, the parties should be permitted to supplement the record with evidence that may be relevant in light of this Court's decision in *Bakke*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration and supplementation of the record in light of *Regents of the University of California* v. *Bakke, supra*.

Respectfully submitted.

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September 1978.

APPENDIX A

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellants.

No. 76-3266.

United States Court of Appeals, Fifth Circuit.

Nov. 17, 1977.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In February 1974, Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement with United Steelworkers of America, AFL-CIO (USWA), that significantly altered eligibility for on-the-job training to enter craft positions in all Kaiser plants. In an effort to increase

the number of minority workers in the craft families, the 1974 Labor Agreement removed the requirement of prior craft experience for on-the-job training and established an entrance ratio of one minority worker to one white worker until the percentage of minority craft workers roughly estimated the percentage of minority population in the area surrounding each plant. Eligibility for training still rested on plant seniority, but to implement their affirmative action goal it was necessary to establish dual seniority lists: for each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective racial groups.[1] As predictable, black employees have been admitted to Kaiser's on-the-job training program with less seniority than their white competitors. One unsuccessful white bidder working at Kaiser's Gramercy, Louisiana, plant brought this class action on behalf of all persons employed by Kaiser at its Gramercy works who are members of the USWA Local 5702, who are not members of a minority group and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974. Mr. Weber alleged that by preferring black employees with less seniority for admission to on-the-job training, Kaiser and USWA were guilty of unlawful discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2 et seq. (1970). The district court agreed and granted a permanent injunction against further use of the 1974 training eligibility quota. Although

[1] The dual lists were maintained solely for eligibility to on-the-job training, and all other seniority benefits were conferred without regard to race.

the 1974 Labor Agreement applies to all Kaiser plants and similar agreements were enacted through the aluminum industry, these facts pertain only to Kaiser's plant in Gramercy, Louisiana, and this action enjoined the use of the quota at that plant only. Kaiser and USWA, supported by numerous amici curiae,[2] bring this appeal asking us to hold that their training quota, which they say is mandated by valid executive action, does not violate Title VII and is justified by past societal discrimination even in the absence of past employment discrimination here.

Affirmative Relief or Reverse Discrimination?

The case before this court today is unique in that the affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with the threats of the Office of Federal Contract Compliance Programs (OFCC) conditioning federal contracts on appropriate affirmative action.[3] The case is also unique in that it presents

[2] Amicus briefs on behalf of Kaiser and USWA were filed by Reynolds Metal Company, the United States and the Equal Employment Opportunity Commission, and Aluminum Company of America (ALCOA). The Southeastern Legal Foundation and the Anti-Defamation League of B'nai B'rith filed amicus briefs supporting appellee Weber.

[3] Executive Order No. 11246 requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin," § 202(1), 3 C.F.R. 169 (1974), reprinted following 42 U.S.C. § 2000e (1970). The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. *See* 41 C.F.R. 60-20.1 et seq.; 41 C.F.R. 60-2.24.

a conflict between affirmative action dictated by the OFCC under Executive Order 11246 and preferential treatment prohibited by Title VII. In *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), Title VII and Executive Order 11246 dictated the *same* response to massive discriminatory practices throughout the steel industry, but the training quota adopted by Kaiser in response to Executive Order 11246 is flatly and literally prohibited by Title VII, § 703(d), which makes it unlawful to limit access to on-the-job training on the basis of race:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e—2(d) (1970). Additionally, section 703(a) prohibits racial classifications in general,[4] and

[4] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

section 703(j) specifies that the Act shall not require preferential treatment.[5] But, of course, the issue here is not whether preferential treatment is required but whether it is forbidden.

When does preferential treatment become illegal reverse discrimination? The answer depends on the law involved, the nature of the affirmative action, and the factual circumstances of the prior discrimination.[6] Federal courts have agreed that the

[5] (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970).

[6] *See United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (does redistricting to assure a black majority illegally dilute the voting strength of Hasidic Jews?); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747. 96 S.Ct. 1251, 47 LEd.2d 444 (1976) (does the grant of fictional seniority to identifiable victims of employment discrimination illegally discriminate against the seniority rights of nonminority employees?); *Bakke* v. *Regents of University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed2d 535 (1977) (does reservation of a certain number of "black" places in the entering class of a state medical school impermissibly discriminate against better-qualified white students who would have been admitted but for the racial quota?); *Chance* v. *Board of Examiners and Board of Education of New York*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, ——U.S. ——, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977) (does a quota which requires the percentage of black and Puerto Rican supervisors to reflect the surrounding population discriminate by forcing the dismissal of whites with greater seniority?).

"make whole" objective of Title VII[7] permits and even requires affirmative relief when necessary to correct continuing inequalities created by past discriminatory employment practices.[8] In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the Court seems to have adopted this circuit's "rightful-place" doctrine,[9] authorizing fictional seniority in order to place the victims of discrimination in as good a place as they would have enjoyed absent discriminatory hiring practices.

> Obviously merely to require [respondent] to hire the class three victim of discrimination falls far short of a "make whole" remedy. A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these

[7] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

[8] This duty is analogous to the equitable duty to eliminate the continuing effects of past discrimination in voting rights, *United Jewish Org. of Williamsburgh, Inc.* v. *Carey*, *supra*; *Louisiana* v. *United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), or to the courts' equitable power to correct continued inequities resulting from intentional segregation of schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[9] For a discussion of the "rightful-place" doctrine, *see Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

> various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors. [footnotes omitted].

Id., 424 U.S. at 767-68, 96 S.Ct. at 1265-1266. The Court made it clear that an award of artificial seniority may not be denied on the ground that it conflicts with the economic interests of other employees.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination. . . .

Id. at 774, 96 S.Ct. at 1269.

The Supreme Court has never approved the use of a quota remedy to overcome employment discrimination, but circuit courts have repeatedly sanctioned judicially imposed quotas in certain factual circumstances. Prior to the 1972 amendments to Title VII, our circuit approved such a quota. Local 53,

International Ass'n of Heat & Frost Insulators & Asbestos Workers v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969). *Accord, United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144, 149-59 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States* v. *Sheetmetal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969). In 1972, a Senate amendment to overturn this case law and forbid the use of quota remedies was rejected two-to-one. Legislative History of Equal Employment Opportunity Act of 1972 at 1017, 1042-74, 1081, 1714-17 (1972). The bill amending Title VII in 1972 provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcom. on Labor of the Senate Com. on Labor and Public Welfare, Legislative History, *supra* at 1844. Since 1972, judicially imposed quota remedies have been widely approved. *United States* v. *International Union of Elevator Constructors Local 5*, 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638*, 532 F.2d 821 (2d Cir. 1976); *Boston NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc),

cert. denied, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc); *Southern Illinois Builders Association* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). But our courts have not been unaware of the dangers of granting preferential treatment on the basis of race:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where compelling need for remedial action can be shown. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a high-

> er proportion of whose members had previously enjoyed access to a certain opportunity. [footnotes omitted].

Associated General Contractors of Massachusetts, Inc. v. *Altshuler*, 490 F.2d 9, 17-18 (1st Cir. 1973). Three circuits have refused to approve racial quotas when the factual circumstances of the past or present discrimination did not dictate such an extraordinary remedy. *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Chance* v. *Board of Examiners, supra; Watkins* v. *United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Title VII and Executive Order 11246

Quotas imposed to achieve the "make whole" objective of Title VII rest on a presumption of some prior discrimination. There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their "rightful place" in the employment scheme. Several circuits have noted this distinction, holding that quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not. *United States* v. *Wood, Wire & Metal Lath. International Union Local 46*, 471 F.2d 408, 413 (2d Cir. 1973); *Carter* v. *Gallagher, supra* at 329; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 173 n.47 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *United States* v. *Ironworkers Local 86*, 443 F.2d 544,

553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States* v. *International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Local 53, International Association of Heat & Frost I. & A. Workers* v. *Vogler, supra* at 1052. But see *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977); and *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra* (Executive Order 11246 may provide an alternative justification for racial quotas totally apart from any violation of Title VII).

Courts also have affirmed quota remedies imposed by federal affirmative action programs under the impetus of Executive Order 11246 and comparable state affirmative action programs. *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra; Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra* (the Philadelphia Plan); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (1970) (the Cleveland Plan); *Joyce* v. *McCrane*, 320 F.Supp. 1284 (D.N.J.1970) (the Newark Plan); *Southern Illinois Builders Association* v. *Ogilvie, supra* (the Illinois-Ogilvie Plan). The affirmative action program mandated by 41 C.F.R. § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority and female representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist. The regulation then

confuses things mightily by declaring that a goal shall not be considered a device for instituting quotas or reverse discrimination:

> [T]he purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

41 C.F.R. § 60-2.30. Attempts to distinguish a numerical goal from a quota have proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas.[10]

We must judge the legality of Kaiser's training ratio in light of both Title VII, with its "make-whole" objective, and Executive Order 11246, with its mandate for affirmative action that does not itself discriminate.

1974 Labor Agreement

Petitioner Weber complains of Kaiser's dual seniority system that permits black employees to be admitted to on-the-job training programs ahead of

[10] While serving in the Labor Department, I helped devise minority employment goals for government contractors.

> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we wished to avoid.

Silberman, *The Road to Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12. col. 4.

white employees with greater seniority. The offending portions of the 1974 Labor Agreement provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the plants set forth below, and, where necessary, establish certain goals and timetables in order to achieve a desired minority ratio: [Gramercy works listed, among others].
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates...

1974 Labor Agreement, Addendum to Art. 9 dealing with seniority. The Joint Committee entered into a Memorandum of Understanding which established a goal of 39% minority representation in each craft family at the Kaiser Gramercy plant.[11]

The one-for-one ratio was then implemented to accomplish this goal.

In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft fami-

[11] Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups.

Weber v. *Kaiser Aluminum Corp.*, 415 F. Supp. 761, 764 (E.D.La.1976).

lies of *instrument repairman, electrician* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.

* * * * * *

It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Weber v. *Kaiser Aluminum Corp.*, 415 F.Supp. 761, 764 (E.D.La.1976).

It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race. In *McDonald* v. *Santa Fe Trails Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court held that Title VII prohibits racial discrimination against white employees upon the same standards as would be applicable were they Negroes. 427 U.S. at 278-282, 96 S.Ct. at 2577-2578, 49 L.Ed.2d at 500-01. *Accord Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (Title VII prohibits preferences for any groups, minority or majority.

The district court granted injunctive relief against the complained-of quota system on two grounds:

> (1) Courts may establish affirmative action programs as a form of relief in Title VII cases, but when an employer and a union voluntarily adopt a quota system this violates Title VII.[12] Quota systems must be imposed with great caution, and *only the judiciary* should be entrusted with fashioning and administering such relief.
>
> (2) Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

We disagree with the district court's reasoning that what courts may force upon employers in the name of

[12] The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.
415 F.Supp at 767.

Title VII employers and unions may not voluntarily institute. In *United States* v. *Allegheny-Ludlum Industries, Inc., supra,* which dealt with consent decrees eliminating patterns and practices of discrimination in the steel industry, this court emphasized that voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII. *See also Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970); *Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969); *Oatis* v. *Crown Zellerbach*, 398 F.2d 496, 498 (5th Cir. 1968). But there is strong authority to support the position that courts are not subject to the same restrictions as employers. Section 703, which defines unlawful employment practices, does not limit judicial remedies which are governed by the broad language of section 706(g) authorizing "such affirmative action as may be appropriate."

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§ 703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies.

United States v. *International Union of Elevator Constructors Local 5, supra* at 1019. In *Franks* v. *Bowman Transportation Co., supra,* the Supreme Court affirmed this view that the definitional section 703(h)

does not limit relief otherwise appropriate under section 706(g). We need not now probe into the distinctions between court-ordered remedies and permissible remedies voluntarily hammered out in collective bargaining agreements because we affirm the district court's opinion on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed.

No Prior Discrimination

The district court found, and appellants all but concede,[13] that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant:

> It was also established by the testimony of Mr. English [Kaiser's industrial relations superintendent at its Gramercy plant] that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the per-

[13] Appellants argued that because prior craft experience was formerly required for admittance to on-the-job training and because minorities lacked such experience due to the discriminatory nature of craft unions, indeed there had been some prior discrimination at the Gramercy plant. But only 25 employees were elevated to craft positions through this training program in the ten years prior to 1974; two of these were black. We conclude that this program was so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period. That only three black crafts workers were hired from outside the plant reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser.

centage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that *Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.*

With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. *Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community.* Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen. (emphasis added).

415 F.Supp. at 764. In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other

impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment "not because he is Black, but because, and only to the extent that, he has been discriminated against." *Chance* v. *Board of Examiners, supra* at 999. If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.

Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination.* For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the

[14] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title VII. *Cf. Local 189, United Papermakers & Paperworkers* v. *United States, supra* at 988. Finding no victims of employment discrimination, the Eighth Circuit reversed a racial hiring quota designed to favor less qualified minority applicants over more qualified white applicants:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

Carter v. *Gallagher, supra* at 325. Here we do not deal with minority workers less qualified as to skills;[15] presumably each employee seeking admittance to on-the-job training is unskilled for the craft position he or she seeks. Rather, we are confronted with white employees who are more senior than selected black trainees. As noted at the outset, these dual seniority lists, one for black employees and one for white employees, are maintained only for purposes of

[15] Although ability to perform and physical fitness are factors to be considered in addition to seniority in admiting employees to on-the-job training, the amicus brief of the Equal Employment Opportunity Commission asserts that there was no evidence and no suggestion that any unsuccessful white bidder had greater ability or was more physically fit than the successful black bidders.

selecting on-the-job trainees and do not reflect preferential treatment in layoff, recall, transfer assignments, working conditions or any other benefit. But the importance of seniority principles in allocating scarce opportunities such as training for advancement cannot be overlooked.[16] And because we deal here solely with an effect of seniority, it is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at the larger universe of all Kaiser operations or indeed about society at large. Seniority is acquired at the plant and operates on a basis neither larger nor smaller than the plant. Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other. Here, unlike in *Franks* v. *Bowman Transportation Co., supra*, there has been no discriminatory refusal to hire and therefore, here, there is no occasion to restore any employee to his rightful place. *Accord Watkins* v. *United Steelworkers*

[16] Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy & E. Livernash. The Impact of Collective Bargaining on Management, 104-115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-347, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Franks v. *Bowman Transp. Co.*, 424 U.S. at 765, 96 S.Ct. at 1265.

of America Local 2369, 516 F.2d 41 (5th Cir. 1975) (a last-hired, first-fired seniority system resulting in the layoff of more blacks than whites is not discriminatory where the individuals who suffered the layoffs were in their rightful place and had never personally experienced prior employment discrimination); *Chance* v. *Board of Examiners, supra* (a last-hired, first-fired layoff plan which has never been discriminatory may not be suspended to permit black or Puerto Rican supervisors to keep their jobs in preference to a white supervisor with greater seniority). Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and the seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violated Title VII. We concur in the district court's opinion that however laudable the objective of training minority workers, Title VII clearly proscribes discriminating against majority workers:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it

> well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocable prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

415 F.Supp. at 769 (original emphasis).

Executive Order 11246

Appellants contend that if this racial quota is not sanctioned by Title VII it is sanctioned by Executive Order 11246 and regulations issued by the Office of Federal Contract Compliance (OFCC) mandating affirmative action by all government contractors. Indeed, the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts.

Appellees respond that because Kaiser has actively recruited black craft workers it has complied with the executive requirement of affirmative action and is not guilty of "underutilization." They argue that, properly interpreted, Executive Order 11246 would not require a racial quota in these circumstances and that the OFCC improperly threatened the withdrawal of all federal contracts unless this racial preference was enacted.

Executive Order 11246, with its implied mandate for affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra* at 166-71 (upholding the "Philadelphia Plan"); *see also Farkas* v. *Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). But executive orders may not override contradictory congressional expressions. In the famous challenge to executive power in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson divided executive orders into three categories: (1) those in which the President acts pursuant to express or implied authorization by Congress, as to which his authority is at a maximum; (2) those in which the President acts in the absence of congressional grant of authority and must rely upon his own independent powers; and (3) those in which executive action conflicts with the express or implied will of Congress and is most vulnerable to challenge.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized

> with caution, for what is at stake is the equilibrium established by our constitutional system. [footnotes omitted].

343 U.S. at 638, 72 S.Ct. at 871. The Third Circuit first validated the Philadelphia Plan as valid executive action and then tested it for conflicts with congressional action, holding that "the Executive is bound by the express prohibitions of Title VII." 442 F.2d at 171-72. The Third Circuit held that the general prohibition against discrimination found in sections 703(a), (h) and (j) did not prohibit the affirmative action imposed by the Philadelphia Plan, *given a finding of prior exclusionary practices* by the six trade unions controlling the work force.

Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition.

We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas—and the short-term and obvious benefits must not blind us to the seeds of racial animus such affirmative relief undeniably

sows[17]—Congress has forbidden racial preferences in admission to on-the-job training programs, and under the circumstances of this case we are not empowered by the equitable doctrine of restorative justice to ignore that proscription.

AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

Today the Court grapples with the question whether, in a collective bargaining agreement, recognition of race for remedial purposes in employment practices is legal "affirmative action" or illegal "reverse discrimination". The majority does not assert race may never be considered in employment practices or in other racially tense areas. Over ten years ago this Court declared, "The Constitution is both color blind and color conscious".[1] Where I differ from the majority is in my assessment of situations justifying reliance on race as a basis for decision-making. Here, the decision-making was by agreement between management and the union, presum-

[17] Racial quotas also have been criticized for contributing to the Balkanization of this country by fostering "the dangerous notion that ethnic, racial or religious groups are entitled to proportional representation in all occupations."

> In hindsight, one can see this was predictable. We wished to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice.

Silberman, supra at col. 5.

[1] *United States* v. *Jefferson County School Board*, 5 Cir. 1966, 372 F.2d 836, 876, *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103. Continuing, we said: "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." 380 F.2d at 385.

ably with the blessing of the legislative and executive branches of government but without benefit of the judicial branch. "Management and the government have been our [the unions'] partners in these endeavors [to eliminate discriminatory employment practices] and a great deal of credit must be given to them for the accomplishments of the past ten years." Bredhoff, Affirmative Action in a Declining Economy: Seniority and Incumbent Majority, in Federal Bar Association, An Equal Employment Opportunity Practice Guide, 118, 119 (1977). The third party beneficiaries of these joint endeavors and agreements are the disadvantaged minorities.

There are three independent legal justifications for these defendants' actions. I must therefore dissent.

I.

The majority accurately and completely presents the facts of this case. A look at the facts from a different point of view, however, is needed to put the defendants' actions in the proper perspective.

This action was brought by a white worker at the Kaiser Aluminum and Chemical Corporation [Kaiser] plant in Gramercy. Gramercy, a town with a population of about 2000, is in St. James Parish, Louisiana, about fifty miles northwest of New Orleans. The Gramercy plant was opened by Kaiser in 1958. Workers at that plant, as in other Kaiser plants, are represented by the United Steelworkers of America [the Union]. St. James and the adjacent

parishes had a minority population of about 43 percent at the time of trial. The workforce in those parishes was estimated at 39 percent black.[2] At the time of trial the Kaiser workforce at Gramercy was 14.8 percent black. This was a sharp increase from 1969, when, under federal government pressure, Kaiser began hiring at the gate on a one-to-one black to white ratio. At that time the Kaiser workforce was approximately 10 percent black.[3] Before 1969 the plant had hired unskilled labor at the gate by choosing "the most qualified". There was evidence at the trial from two Kaiser personnel officials that Kaiser had never discriminated by race at its Gramercy plant.

After the 1969 action, Kaiser was still concerned about the low percentage of black craftsmen at its plant. Prior to 1974 only five of the approximately 290 craftsmen at the plant were black. The company made strenuous but unsuccessful efforts to attract more black craftsmen. Pressure from the federal government continued, not just at the Gramercy plant but nationally. Kaiser and the Union discussed the problem in negotiations leading to their 1974 collective bargaining agreement.

[2] The plan in question applied to blacks, other minority groups, and women. However, at Gramercy its application thus far has involved only blacks. For convenience, I use the term "blacks" both in the specific Gramercy situation and in other situations, when a more complete statement would include the other affected groups.

[3] The record shows that the Gramercy plant has experienced an increase in black employment of about one percent of their total workforce per year since 1969. Although there was no direct evidence about the percentage of black employees in 1969, extrapolation from those figures produces an estimate that about 10 percent of the Kaiser workforce at Gramercy was black in 1969. Appendix at 123-24, 129-30, 137.

Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, brought by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA.[4]

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826. The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers. Simultaneously, two consent decrees were filed. The first decree, entered in April 1974 provided:

> All permanent vacancies in apprenticeships and in entry level jobs in lines of promotion containing occupations which in fact lead to craft jobs,

[4] Both companies entered this action as amici curiae, asserting an interest in the litigation because collective bargaining agreements to which they are parties contain similar provisions. ALCOA Brief at 1, Reynolds Brief at 1.

> shall be filled on a plant-wide basis from among qualified bidding employees... In order to meet the implementing ratio [50 percent], seniority factors shall be applied separately to each group for whom timetables are established and to all other employees.

United States v. *Allegheny-Ludlum Industries, Inc.*, Consent Decree I, BNA FEP Manual, 431: 125, 138-39 (1974). Although that decree had not been entered at the time of the agreement in question here, there was testimony that the Kaiser agreement was influenced by the Allegheny-Ludlum negotiations.[5] The Union was a party to both agreements.

II.

The district court rested its decision on two grounds. First, it held that Title VII prohibited completely any privately imposed "quotas". Alternatively, it found this plan illegal because a court would not have imposed it as a remedy in the circumstances this case presents. The majority properly rejects the first ground. As Judge Gee points out, that position would completely contradict the emphasis Congress laid on voluntary conciliation under Title VII. *See Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Alexander* v. *Gardner-Denver Co.*, 1974, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2D 147. The majority, however, accepted the district court's second ground, and agreed that

[5] *See* Appendix at 152 (Thomas Bowdle, Kaiser's Director of Equal Opportunity Affairs). 131 (Dennis English, Industrial Relations Supervisor at Gramercy).

this plan would not have been imposed by a court.[6] The Court accepted that conclusion largely on the strength of the district judge's finding that the defendants had not engaged in discrimination in the past at Gramercy. I believe that the majority has judged the defendants' actions by the wrong standard.[7]

The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay.

[6] The majority opinion leaves in question the status of consent decrees. These decrees, like the one approved by this Court two years ago in *Allegheny-Ludlum*, may be entered without extensive fact-finding by the district court. If consent decrees are immune from the majority's test, friendly suits would offer employers an easy way to circumvent the holding of this opinion. If they are not immune, the district court, before accepting the consent decree, will be forced to determine the existence and extent of past discrimination by the defendants.

[7] For reasons detailed below, at slip opinion at 688-689, ———, I believe that the district court's finding that there was no prior discrimination at the Gramercy plant is highly questionable. Even under the majority's standard, the district court must be reversed if that finding is clearly erroneous. Rule 52(a) F.R.Civ.P. My disagreement with the standard the majority applies makes it unnecessary to determine whether this finding falls within Rule 52(a).

See Albemarle Paper Co. v. *Moody*, 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L.Ed.2d 280.

Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

The majority's standard will lead to less voluntary compliance with Title VII. Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions, or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the Congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further delayed.

In this case of first impression,[8] we should not hold these defendants to so strict a standard. If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from liability,

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[8] The Supreme Court expressly reserved the question of the validity of "affirmative action programs" when it held that Title VII applied to white male workers. *McDonald* v. *Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 281 n. 8, 96 S.Ct. 2574, 49 L.Ed.2d 493. The Courts of Appeals have considered and rejected "quotas" in some cases where such relief was sought in the district courts. *See, e. g., Chance* v. *Board of Examiners*, 2 Cir. 1976, 534 F.2d 993, *cert. denied*, ____ *U.S.* ____, *97 S.Ct. 2920, 53 L.Ed.2d 1060; Watkins v. United Steelworkers of America*, 5 Cir. 1975, 516 F.2d 41; *Waters* v. *Wisconsin Steel Works*, 7 Cir. 1974, 502 F.2d 1309, *cert. denied*, 1976, 425 U.S. 987, 96 S.Ct. 2214, 48 L.Ed.2d 823. Several lower courts have considered voluntarily instituted preferential hiring in light of Title VII. *See Cramer* v. *Va. Commonwealth University*, 1976, E.D.Va., 415 F.Supp. 673; *Reeves* v. *Eaves*, 1976, N.D.Ga., 411 F.Supp. 531. *Cf. Anderson* v. *San Francisco School Unified District*, 1972. N.D.Cal., 357 F.Supp. 248 (not governed by Title VII); *Flanagan* v. *Georgetown University*, 1976, D.D.C., 417 F.Supp. 377 (distribution of scholarship funds, governed by Title VI).

The Supreme Court has held that race may "be considered in formulating a remedy" (*North Carolina State Board of Education* v. *Swann*, 1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586); in devising remedies, seniority credits for past discrimination (*Franks* v. *Bowman Transportation Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444); in carrying out a prophylactic program to prevent racially disadvantageous outcomes, whether or not they violate the Constitution (*United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229, in avoiding racially disproportionate effects of employment testing practices (*Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280).

would encourage private settlements.[9] If this standard were applied to the case before us, we should reverse.

In spite of the district court's finding that the defendants had not discriminated against blacks at Gramercy, there were arguable violations. The district court made its finding on the basis of testimony from two Kaiser personnel officials. The defendants were never required to rebut a prima facie case, proved statistically, because the statistics were never analyzed by the district court.[10] The reason for the lack of analysis is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the

[9] We need not consider in this case the validity of a settlement if actual, as opposed to arguable, discrimination is found by a reviewing court. Even if such a settlement were given no effect, voluntary compliance would be encouraged because the employer would be protected from suits from at least one side.

[10] Usually, a statistical showing of a significant discrepancy between the percentage of minority group members employed and the percentage of the minority group members in the relevant labor market is sufficient to make a prima facie case for a violation. *See International Brotherhood of Teamsters* v. *United States*, 1977, ____ U.S. ____, ____, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *Wade* v. *Mississippi Cooperative Extension Service*, 5 Cir. 1976, 528 F.2d 508, 516-17; *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 120. *See also Hazelwood School District* v. *United States*, 1977, ____ U.S. ____, ____-____, 97 S.Ct. 2736, 2741-2744, 53 L.Ed.2d 768, 777-80; *Dothard* v. *Rawlinson*, 1977, ____ U.S. ____, ____-____, 97 S.Ct. 2720, 2726-2728, 53 L.Ed.2d 786, 797-98.

only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Such an analysis would show three possible or probable violations.

First, Kaiser may have discriminated against blacks for unskilled jobs. The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10 percent in 1969. The testimony that Kaiser had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through nonvalidated tests,[11] or impermissibly subjective processes.[12] The statistics here constituted a prima facie case of discrimination.[13] The district court did not require and the defendants did not present any evidence in rebuttal. Such discrimination would be linked to this case because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority.[14]

[11] *See* 42 U.S.C. § 2000e-2(h) (1970); *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849. 28 L.Ed.2d 158; *Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 425-36, 95 S.Ct. 2362, 45 L.Ed.2d 280; *James* v. *Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 334-40; *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 221.

[12] *See James* v. *Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 345-47; *Bolton* v. *Murray Envelope Co.*, 5 Cir. 1974, 493 F.2d 191, 195; *Rowe* v. *General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359; *United States* v. *Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 442, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

[13] *Compare Dothard* v. *Rawlinson*, 1977, ____ U.S. ____, ____, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (relevant labor market 36.89 percent female, employees only 12.9 percent female establishes prima facie case).

[14] Compare this with the majority's ground for rejecting societal discrimination as a justification for this program, *supra* at pp. slip opinion at pp. 680-681, ____-____.

Second, the requirement that employees have prior experience in the crafts to enter the limited training program in effect before 1974 may have violated Title VII. Only two of 28 employees trained under that program were black. While there was evidence that each year of a worker's experience saved the company money, no effort was made to present contrary evidence. The judge simply accepted the statement that prior experience was a business necessity validating the requirement in spite of possible differential effects on blacks and whites. The business necessity defense, however, is narrow. The fact that it may be cheaper or more convenient to use a criterion with divergent impact is not enough to justify its use. *See Watkins v. Scott Paper Co.*, 5 Cir. 1976, 530 F.2d 1159, 1168, 1179-83, *cert denied*, 1976, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *United States v. Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2d 652, 662-65; *Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, 989-91 *cert. denied*, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100. *See also Jones v. Lee Way Motor Freight*, 10 Cir. 1970, 431 F.2d 245, *cert. denied*, 1971, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed. 237; *Pettway v. American Cast Iron Pipe*, 5 Cir. 1974, 494 F.2d 211; *Buckner v. Goodyear Tire and Rubber*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir. 1973, 476 F.2d 1287 (three cases where training programs were tested against the business necessity standard). *Cf. E.E.O.C. v. New York Times Broadcasting Service*, 6 Cir. 1976, 542 F.2d 356 (prior experience not a valid requirement when the previous employer prevented the discriminatees from acquiring experience).

The majority tries to avoid this content by asserting that the program was "to limited in scope" to be characterized as an unlawful practice. The size of the program may be relevant to the weight to be given the statistics describing it, but the small impact of an action provides no immunity. *See McDonald v. Sante Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (two people); *Green v. McDonnell Douglas Corp.*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (one person). If past experience does not satisfy the business necessity requirement, and if more whites than blacks had past experience, then a serious question of Title VII liability is raised even if only one position is at stake.

Third, the requirement of any training for some craft jobs may be illegal. While this claim would be the most easily refuted by an employer, no refutation was even attempted. In light of the extremely narrow scope of the business necessity exception, some rebuttal would be necessary.

The district judge accepted Kaiser's claims of nondiscrimination. It appears from the record that Kaiser did act in good faith. The company made admirable attempts to recruit black craftsmen, and responded strongly to the problem with its unskilled labor force in 1969. Good faith, however, is not a defense to Title VII. Although the three potential violations discussed above may not make the district court's finding "clearly erroneous" in the sense contemplated by Rule 52(a), F.R.Civ.P., arguable violations clearly existed.

To immunize this plan the defendants should also be required to show that the plan is a reasonable remedy. The similar provisions required by courts in Title VII litigation demonstrate that this relief can be reasonable. *See, e. g., Rios v. Enterprise Association Steamfitters Local 638*, 2 Cir. 1974, 501 F.2d 622; *United States v. Ironworkers Local 86*, 9 Cir. 1971, 443 F.2d 544, *cert. denied*, 1971, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; *Buckner v. Goodyear Tire and Rubber Co.*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir., 476 F.2d 1287. *Cf. Southern Illinois Builders Association v. Ogilvie*, 7 Cir. 1972, 471 F.2d 680, upholding a similar program under the Executive Order and *United States v. Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826, upholding a similar program as part of a consent decree. Three other factors add weight to that conclusion.

First, the plan was negotiated by the employer and the union. The privileges which federal law grants a union as the representative of the covered workers carry with them the duty to represent in good faith the interests of all the workers. *See Steele v. Louisville & N. Rwy. Co.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (Railway Labor Act); *Ford Motor Co. v. Huffman*, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Humphrey v. Moore*, 1964, 375 U.S. 335, 84 S.CT. 863, 11 L.ED.2D 370; *Vaca v. Sipes*, 1967, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842. An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a

majority of the bargaining unit, serves as a check on the fairness of the plan.[15]

Second, the kind of relief given reduced the impact on white workers. Our Court and the Supreme Court have adopted the "rightful place" theory for remedying discrimination. *See International Brotherhood of Teamsters v. United States*, 1977, ___, U.S. ___, ___, 97 S.Ct. 1843, 1873-75, 552 L.Ed.2d 396, 437-441; *Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, *cert. denied*, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *Gamble v. Birmingham Southern R.R. Co.*, 5 Cir. 1975, 514 F.2d 678, 683; *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 441. Other circuits

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[15] The Union's influence can be seen in the provisions which give white employees a significant share of these new opportunities. One of the Union's major goals was to provide more advancement opportunities for Kaiser employees in place of workers hired off the street. Appendix at 152.

> The Union's duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if that requires assisting some of its members more than others.
>
> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest . . . The Court has also held that a collective bargaining agreement may go further, enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of "the highest priority"; is certainly no less than in other areas of public policy interests.

Franks v. *Bowman Transportation Co.*, 1976, 424 U.S. 747, 778 79, 96 S.Ct. 1251, 1271, 47 L.Ed.2d 444, 469-70.

also adopted the rightful place theory as a fair solution. *See, e. g., United States v. Navajo Freight Lines*, 9 Cir. 1975, 525 F.2d 1318; *Reed v. Arlington Hotel Co.*, 8 Cir. 1973, 476 F.2d 721, *cert. denied*, 1973, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (remedy must consider the interests of both groups); *United States v. Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2d 652, 659.

The rightful place remedy was originally seen as a compromise among three competing theories: "freedom now", "rightful place", and "status quo". *Local 189*, 416 F.2d at 988. The "freedom now" remedy would have displaced white workers in an effort to completely eliminate the effects of past discrimination. The "status quo" remedy would protect all the expectations acquired by white workers. The "rightful place" theory did not attempt to displace white workers, but required that any future actions be untainted by past discrimination. Since that time, some judges have expressed reservations about ordering relief which put too great a burden on white employees to assist blacks: "robbing Peter to pay Paul". *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 781, 96 S.Ct. 1251, 47 L.Ed.2d 444 (Burger, C. J., dissenting). *See id.*, 424 U.S. at 787-91, 96 S.Ct. 1251 (Powell, J., dissenting and concurring). The most prominent recent cases where a court refused to order a "quota" remedy involved layoffs, when such a quota would have meant that whites would have lost their jobs in deference to less senior blacks. *See Chance v. Board of Examiners*, 2 Cir. 1976, 534 F.2d 993, *cert. denied*, 1977, ___ U.S. ___, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins v. United Steelworkers of America*, 5 Cir. 1975, 516 F.2d 41; *Jersey Central Power & Light Co. v. IBEW*, 3 Cir. 1975, 508 F.2d 687, *vacated and remanded*, 1976, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812, *on remand*, 3 Cir., 542 F.2d 8; *Waters v. Wisconsin Steel Works*, 7 Cir. 1974, 502 F.2d 1309, *cert. denied*, 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823; *Anderson v. San Francisco School District*, 1972, N.D.Cal., 357 F.Supp. 248; *cf. Kirkland v. New York State Dept. of Correctional Services*, 2 Cir. 1975, 520 F.2d 420 (quotas should not be imposed when identifiable white "victims" of the remedy exist).

In the instant case entirely new rights were created by the plan. None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement. Only those workers with prior experience had been eligible for training, and that pool had been exhausted. No white workers lost their jobs, none had expectations disappointed. Instead, the defendants created entirely new expectations in all the employees, without harming the chances of any Kaiser employee for such training.

Finally, the plan is reasonable because it allows significant white participation. Although the fastest way to remedy past discrimination would have been to institute a training program just for blacks,[16] the Agreement provides that 50 percent of the workers

[16] A program of pre-training preparation exclusively for blacks was approved by this Court in *Buckner* v. *Goodyear Tire and Rubber Co.*, 5 Cir. 1973, 476 F.2d 1287, *aff'd without opinion*, 1972, N.D.Ala., 339 F.Supp. 1108. In a dissenting opinion strenuously attacking the use of

(footnote continued)

trained will be white. Every Kaiser employee can benefit from the program. It is true that black employees receive more than their white colleagues, but the black employees arguably faced racial discrimination at Kaiser's hands—the white workers did not. This white participation makes the plan more reasonable. *See Carter v. Gallagher*, 8 Cir. 1972, 452 F.2d 315 (en banc), *cert. denied*, 1972, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338; *United States v. N. L. Industries*, 8 Cir. 1973, 479 F.2d 354; *Patterson v. Newspaper Deliverers' Union*, 2 Cir. 1975, 514 F.2d 767, 773, 775, *cert. denied*, 1976, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203.

Thus, the 1974 Agreement was a reasonable response to the situation. The defendants were faced with arguable violations of Title VII, federal government pressure, and the impending steel industry settlement. They created an affirmative action plan which aided all Kaiser employees while particularly assisting minority group members. We should not upset their efforts.[17]

(footnote continued)
quota remedies, Judge Hays of the Second Circuit stated that training programs exclusively for blacks were legitimate affirmative action. *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 2 Cir. 1974, 501 F.2d 622, 637.

[17] One advantage of the standard I propose is that it takes the reasonableness of the remedy into consideration. The majority is concerned mainly with the existence of past discrimination. Once such discrimination is found, the only question appears to be whether a district court could have imposed such a remedy. A district court's remedial authority in Title VII is extremely broad.

> "The provisions of this subsection [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible."

118 Cong.Rec. 7168 (1972), Section-by-Section Analysis of Equal Employment Opportunity Act of 1972. The standard proposed in this dissent would limit private parties more than § 706(g) limits the judiciary by requiring that the remedy be "reasonable".

III.

The defendants' actions may also be upheld as a proper response to societal discrimination against blacks. The majority avoids the merits of this contention.

The Court does not deny that discriminaiton by craft unions may have had a major effect on the number of black craftsmen. The majority, however, focuses on the question of seniority. Those affected by the claimed discrimination are now unskilled workers. Because of the lower court's determination that there was no discrimination at Kaiser's Gramercy plant, those unskilled workers have a seniority status which is unaffected by past discrimination. The majority then concludes that past discrimination cannot justify modification of this untainted seniority system to produce the job training ratios used.

> "Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII."

The majority's error is in its last step. It connects the ratio with a change in the seniority system, but that misses the point. Seniority was the system voluntarily adopted by the defendants to allocate

scarce opportunities within the black and white employee groups created by this plan. Although seniority is a major tool in modern labor relations, it is a voluntary tool. Unions and employers may agree on other methods of allocation. If, for example, the training program had provided that training opportunities would be divided among able black and white workers by two separate lotteries, the majority's error would be clear. Although the past discrimination against blacks would not in any way affect their lottery numbers, that would have no implications for the validity of the program. The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools is irrelevant. Admissions were not "admittedly and purely functions of seniority", they were functions of race first, then seniority. No other situation existed before 1974, because there was no such training program before the 1974 Agreement. The only training program that existed then made admission a function of experience, not seniority. The Court cannot avoid the merits of the defendants' assertion—societal discrimination justifies this plan.

Therefore, I am forced to confront directly the relationship between societal discrimination and Title VII. This is best dealt with by considering two subsidiary questions: May employers compensate employees for societal discrimination, and may race be used as a sign of societal discrimination?

Although the first question does not appear to have been passed upon in the courts, the answer

should be "yes". While the government might not be able to require that restorative justice be done, neither should it prevent it. Title VII prohibits only discrimination by race, sex, religion, or national origin. In other respects the discretion of the employe remains. There should be no objection to an employer preferring, for whatever reasons, employees who have faced discrimination. *See* slip opinion at 679, majority opinion at ____.

The second question is more difficult. If employers may assist those victimized by past discrimination, may they use race as a proxy for the existence of such discrimination? A broad acceptance of that proposition could have drastic effects. Most of the ethnic groups represented in this country have been discriminated against at one time or another. If Americans of Irish, Italian, Jewish, or German extraction were allowed employment preferences as compensation for undoubted past societal discrimination, Title VII would be eviscerated.

Yet a negative answer to that question would also have serious implications. Acknowledged and damaging past discrimination would be without a private remedy in employment training. Unless a member of a minority group could show explicit discrimination, the laws that forbid future discrimination by employers would also forbid corrective action for past discrimination by others. If a large number of the people involved are not able to show this specific discrimination, then the group will be caught in the cycle caused by discrimination. The future laps of the race will be of equal length, but

blacks, Latin-Americans, Asian-Americans, and women will have to start behind the other competitors.

In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities.[18] Yet how many of the excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find crafts jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. The result would be a wrong without a remedy.

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[18] Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice. *See, e. g., United States* v. *International Union of Elevator Constructors*, 3 Cir. 1976, 538 F.2d 1012; *Associated General Contractors of Massachusetts* v. *Altshuler*, 1 Cir. 1973, 490 F.2d 9, *cert. denied*, 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *United States* v. *Wood, Wire and Metal Lathers*, 2 Cir. 1973, 471 F.2d 408, *cert. denied*, 1973, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398; *Southern Illinois Builders Association* v. *Ogilvie*, 7 Cir. 1972, 471 F.2d 680; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 3 Cir. 1971, 442 F.2d 159; *cert. denied*, 1971, 404 U.S. 854, 92 S.Ct. 447, 30 L.Ed.2d 367; *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler*, 5 Cir. 1969, 407 F.2d 1047; *Buckner* v. *Goodyear*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir. 1973, 476 F.2d 1287.

The "home town plans", favored by recent Secretaries of Labor as an alternative to the Philadelphia-type plans, have not brought a great improvement. N. Y. Times, October 16, 1977 § 4, at 2, Col. 4.

Some measures to compensate for past discrimination are provided by law currently. The federal government provides by statute a number of preferences for minorities.[19] Closer to this case, employment discrimination law itself imposes requirements on employers which can be viewed only as compensation for racial isolation and its effects. Thus, Title VII's requirement that employment tests must be validated does not require a finding that the employer chose the tests to produce discrimination, nor a finding that the employer produced the conditions that caused lower minority scores on the tests. Instead, it rests on a Congressional purpose not to allow the effects of past discrimination to affect employment decisions when those effects are not job-validated. Similarly, special recruiting efforts aimed at minority groups, often imposed under affirmative action programs,[20] are not conditioned on a showing that the employer intentionally selected the "white" media for recruiting. Instead, it is an effort to compensate for the isolation of minority groups from the mainstream of society, caused at least in part by past discrimination.

This dissent is not the place to explore the contours of a societal discrimination justification for employment or training preferences. However, when the discrimination is as egregious and recent as that against blacks in the crafts, a reasonable preference in training programs should be upheld.

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[19] *See* Brief of the United States as Amicus Curiae, *Regents of the University of California* v. *Bakke*, U.S. No. 76-811 (argued Oct. 12, 1977), Appendix A. These programs may be of doubtful constitutionality pending the outcome of *Bakke*.

[20] *See* 41 C.F.R. § 60-2.24(e)(1976).

IV.

A third ground for upholding the defendants' actions is that their program was required by Executive Order 11246, 30 Fed.Reg. 12319. This Executive Order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, starting from the assumption that most disproportionately low employment is the result of discrimination—if not of the contractor involved, then of someone else. I disagree with the majority's view that if the Executive Order purports to legalize this program, the Executive Order is invalid. I believe, however, that the district court would have to determine whether this plan does in fact comport with the requirements of the Executive Order. Therefore, on this ground I would remand the case to the district court for further proceedings.

I do not disagree with the majority's conclusion that if a conflict between the Executive Order and Title VII exists, it should be resolved in favor of Title VII. But that weighty question of the allocation of power between the legislative and the executive branches of government need not be reached. Here, the two are not in conflict.

As the majority points out, affirmative action plans under the Executive Order have been held constitutional. *See E.E.O.C. v A.T. & T.*, 3 Cir. 1977, 556 F.2d 167, *aff'd*, 1976, E.D.Pa., 419 F.Supp. 1022; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 3 Cir. 1971, 442 F.2d 159; *Southern*

Illinois Builders Association v. Ogilvie, 7 Cir. 1972, 471 F.2d 680; *Mele v. Department of Justice*, 1975 D.N.J., 395 F.Supp. 592,*aff'd without opinion*, 3 Cir. 1976, 532 F.2d 747. *Cf. Associated General Contractors of Massachusetts v. Altshuler*, 1 Cir. 1973, 490 F.2d 9, *cert. denied*, 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *Joyce v. McCrane*, 1970 D.N.J., 320 F.Supp. 1184; *Weiner v. Cuyahoga Community College*, 1968 Ohio Ct. of Appeals, *aff'd mem.*, 1969, 19 Ohio St.2d 35, 249 N.E.2d 907, *cert. denied*, 1969, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (similar state plans). For a history of the Executive Order and the response to it in Congress and the courts, *see* Comment, The Philadelphia Plan: A Study on the Dynamics of Executive Power, 39 U.Chi.L.Rev. 752 (1972).

The majority seeks to distinguish *Contractors Ass'n of Eastern Pennsylvania* by stressing the finding there that discrimination had existed in the industry. It should be noted that the parties involved in that case were the contractors; the groups discriminating were the crafts unions. The opinion is in fact directly in point in that respect because it involved actions of the non-discriminating parties.[21]

The legal situation has changed significantly since that opinion. Congress has implicitly exempted the Executive Order from the constraints of Title

[21] The plaintiffs in that case were a contractors' association and several intervening contractors. The unions, against whom the findings of exclusionary practices was lodged, participated only as amici. Thus, the contractors were in the same position that Kaiser finds itself in here.

VII.[22] *See* Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 751-57 (1972). Congress did so through three actions taken during consideration of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261. At that time the regulations requiring affirmative action in the form of goals and timetables had been in effect for several years. The "Philadelphia Plan", the subject of the *Associated Contractors* decision, had been in effect for three years.

The legislation originally presented would have transferred the entire Executive Order enforcement program to the E.E.O.C. Congress eliminated that provision by an amendment offered by Senator Saxbe. In support of the amendment, the Senator stated:

> It has been the "goals and timetables" approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring proce-

[22] The predecessor of this Executive Order was mentioned in the 1964 Act in a section dealing with necessary reports, § 709(d). 42 U.S.C. § 2000e-8(d)(1970). It could be argued that the Order was protected by § 1103. 42 U.S.C. § 2000h-3 (1970), which is a saving clause for then existing authority for federal action.

It could also be argued that the rejection in 1969 of the so-called Fannin Rider demonstrated Congressional approval of the Executive Order. The Comptroller General had declared the Philadelphia Plan illegal on the ground that it lacked standards needed to comply with rules regulating competitive bidding. Senator Fannin introduced a rider to an appropriations bill which would have denied all funds for any contracts held illegal by the Comptroller General. The debate made clear that the Philadelphia Plan was the target of the Rider. *See* Comment, The Philadelphia Plan, *infra*, 747-50.

> dures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

118 Cong.Rec. 1385 (1972). Another amendment which would have had substantially the same result as the original language was rejected by Congress. 118 Cong.Rec. 3367-70, 3371-73, 3959-65 (1972).

The most telling action was the rejection by the Senate of an amendment to § 703(j) of Title VII, offered by Senator Ervin. The Ervin amendment would have extended that section to read:

> Nothing contained in this title *or in Executive Order No. 11246, or in any other law or Executive Order*, shall be interpreted to require any employer . . . to grant preferential treatment to any individual. . . . [Emphasis added.]

118 Cong.Rec. 1676 (1972). This amendment was viewed and debated as an attack on Philadelphia-

type plans. *See* 118 Cong.Rec. 1664-65 (1972) (Sen. Javits).[23]

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1844 (1972). With the decision in *Contractors Association* before it, there can be little question that whatever was the status of that opinion before 1972, Congress ratified the Philadelphia Plan as consistent with Title VII.

The district court did not pass upon the validity and applicability of the Executive Order. There is a question whether Kaiser's extensive recruiting efforts before 1974 completely satisfied the requirements of the Executive Order. *See* 41 C.F.R. § 60-2.1 *et seq.* Furthermore, the regulations promulgated

[23] Senator Javits made clear the connection between the Philadelphia Plan and the Ervin Amendment:

> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans."

118 Cong.Rec. 1665 (1972). The *Contractors Association* decision, which upheld the Philadelphia Plan, was printed in the Congressional Record at Senator Javits' request.

under the Executive Order disclaim any intent to impose a "quota". 41 C.F.R. § 60-2.30. If the majority is right about the effect of Title VII on this litigation, apart from considerations of the Executive Order, then the disavowal in the regulations of quotas might be read in the same way. Those questions require the consideration of the trial court. Therefore, if I accepted the majority's position that Title VII, apart from the Executive Order, prohibited the conduct in question, I would still vacate the decision and remand it for further proceedings.[24]

V.

"Reverse discrimination" is a question of great current concern. It has spawned an extensive literature, and caused heated debates, some between former allies.[25] It is a troubling question. The color blind constitution, so eloquently invoked by the first

[24] If, on remand, the district court were to conclude that the Executive Order was not violated by this plan, then a constitutional question might arise about the validity of this federal action. Of course, I express no opinion on the merits of that constitutional question. *See United Jewish Organizations of Williamsburgh* v. *Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229; *Califano* v. *Webster*, 1977, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360; *Bakke* v. *Regents of the University of California*, 1976, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, *awaiting decision.* ____ U.S. ____, 98 S.Ct. ____, 53 L.Ed.2d ____ (Argued October 12, 1977).

[25] Among the more interesting treatments of this question are R. Dworkin, Taking Rights Seriously 223-39 (1977); N. Glazer, Affirmative Discrimination (1976); Brest, Foreword in Defense of the Antidiscrimination Principle. 90 Harv.L.Rev. 1 (1976); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Fiss, Groups and the Equal Protection Clause, 5 J.Phil. & Pub.Aff.107 (1976); Fiss, A Theory of Fair Employment Laws, 38 U.Chi.L.Rev. 235 (1971); Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw.L.Rev. 363 (1966).

Justice Harlan, has great appeal. A person's color should not be relevant to most decisions. This Court knows that acceptance of that principle did not come easily. At this stage in the history of eliminating racial discrimination, the use of a racial criterion because it is "benign" pulls us perilously close to self-contradiction. But in spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3266

D. C. Docket No. 74-3510 "I"

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and United Steelworkers of America, AFL-CIO, Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GEE AND FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 17, 1977

WISDOM, Circuit Judge, dissenting.

Issued as Mandate: June 5, 1978

APPENDIX C

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and United Steelworkers of America, AFL-CIO, Defendants-Appellants.

No. 76-3266.

United States Court of Appeals, Fifth Circuit.

April 17, 1978.

Appeals from the United States District Court for the Eastern District of Louisiana; Jack M. Gordon, Judge.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion Nov. 17, 1977, 5 Cir., 1977, 563 F.2d 216).

Before WISDOM,* GEE and FAY, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED[1] and the Court having been polled at the request of one of

* Wisdom, J., dissents from the denial of Petition for Rehearing for the reasons stated in his dissenting opinion at 563 F.2d 227-38.

[1] On rehearing it is suggested that our quotation from the panel opinion *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971) is inappropriate since the en banc court, 452 F.2d 327 *et seq.* in fact instituted a modified minority hiring quota on rehearing. Carter, however, was a case in which past racial discrimination in hiring at the "plant"—in that instance a fire department—was established. Our case is the contrary, and we are not persuaded that the en banc determination there is at variance with our decision here. At all events, we agree with the quotation as applied to our context.

the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are also DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 74-3510 Section "I"

BRIAN F. WEBER, Individually and
on Behalf of all other persons
similarly situated

VERSUS

KAISER ALUMINUM & CHEMICAL
CORPORATION AND UNITED STEELWORKERS
OF AMERICA AFL-CIO

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Birmingham, Alabama

AND

Jerry L. Gardner, Jr., Esq., Dodd, Barker, Boudreaux, Lamy & Gardner
New Orleans, Louisiana
For United Steelworkers of America, AFL-CIO

GORDON, J., District Judge:

This civil action seeks relief from the effects of alleged illegal discriminatory employment practices by Kaiser Aluminum & Chemical Corporation (hereinafter referred to as "Kaiser"). A trial was scheduled on plaintiffs' request for a preliminary injunction; however, by stipulation of all of the parties the trial was conducted on the merits of plaintiffs' request for a permanent injunction. This opinion, therefore, relates solely to plaintiffs' prayer for injunctive relief against provisions incorporated by Kaiser in its current collective bargaining agreement, as such provisions pertain to Kaiser's employment practices at its plant located at Gramercy, Louisiana. Plaintiffs contend that these provisions establish a quota system which illegally discriminates against non-minority members of the Kaiser Gramercy labor force in violation of Title VII of the Civil Rights Act of 1964.

Brian F. Weber, the individual plaintiff and class representative, has been an employee for Kaiser for approximately seven years, and is presently working as a laboratory analyst at Kaiser's plant in Gramercy. It appears that Mr. Weber has assumed an active role in the plant's employee-employer relationship inasmuch as he has recently become the chairman of the plant's grievance committee and has also served as a member of the negotiating committee, formed to supply a local supplement to the 1974 Master Labor Agreement, details of which will be discussed later. The plaintiff also is an active member of the United

Steelworkers of America Labor Union, AFL-CIO, Local 5702.

In addition to presenting his own claim, Mr. Weber is serving as representative of a class of workers who have similar grievances. This class has been previously defined to include the following employees:

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974."

Accordingly, the plaintiffs herein consist of Mr. Brian Weber and the class of employees as described above.

The defendants are Kaiser Aluminum & Chemical Corporation, a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of California, and the United Steelworkers of America AFL-CIO (hereinafter referred to as USWA). The USWA is a labor organization created to champion the rights of its members and to bring to bear greater influence upon management during labor negotiations. In the instant case, the USWA is the certified representative of the employees of Kaiser at the Gramercy, Louisiana plant.

On February 1, 1974, Kaiser and USWA entered into an agreement called the "1974 Labor Agreement," which specified hourly wages, hours of work, and conditions of employment. Of particular significance here are the provisions of this collective bargaining agreement relative to minority representation in the trade, craft and assigned maintenance classifications. The pertinent portions of the contract provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:
>
> [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . .
>
> * * *
>
> The term "minority" as used herein shall be as defined in EEOC Reporting Requirements.
>
> (See: Joint Exhibit #1, "1974 Labor Agreement," pp. 164-165.)

These portions of the contract are found in an addendum to Article 9 thereof, which Article deals with "Seniority." The "Joint Committee" thereafter entered into a "Memorandum of Understanding"[1] which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each "craft family" at the Kaiser Gramercy plant.[2]

In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician,* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.

In October, 1974, Kaiser posted additional bids for on-the-job training opportunities, this time in the category of *insulator* and *carpenter.* According to Mr. Weber's testimony, the vacancy in the insulator category was filled by a black employee, since the bid was restricted to blacks only. In the category of carpenter, one black and one white were selected.

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[1] Joint Exhibit # 2.
[2] Joint Exhibit # 2, p. 8, and Exhibit B thereto.

It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Kaiser operates many plants throughout the country, but for the purposes of this litigation, we are only concerned with the Labor Agreement as it affects employment practices at the plant located in Gramercy, Louisiana. Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. It was also established by the testimony of Mr. English that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.

With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen.

Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U.S. Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations. The

plaintiffs here contend that as the quota system affects the Gramercy plant it unlawfully prefers black employees who have never been subject to prior discrimination by Kaiser.

The defendants' initial contention is that seniority rights are derived from collective bargaining agreements, and, thus, are contractual rights which are not properly the subject of Title VII of the Civil Rights Act of 1964.

This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive collective bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. *Ferrara v. Pacific Intermountain Express Company*, 301 F. Supp. 1249 (S.D. Illinois, E.D. 1969); *Schick v. H.L.R.D.*, 409 F.2d 395 (7th Cir. 1969).

On the other hand, a union or company cannot lawfully bargain for the establishment or confirmation of unlawful discriminatory practices. *Emporium Capwell Co. v. Western Addition Community Organization*, U.S. , 95 S.Ct. 977, L.Ed.2d (Feb. 1975).

Because the plaintiffs contend that the collective bargaining agreement establishes a quota system which is in violation of the Civil Rights Act of 1964, this Court has the authority and jurisdiction to consider their claims even though the quota system was the product of a labor-management agreement.

In its consideration of Plaintiffs' claims under the 1964 Civil Rights Act, this Court will be concerned only with Title VII of such Act which made the elimination of employment discrimination based on race, color, religion, sex or national origin in all industries affecting interstate commerce an avowed objective of the Federal Government. This endeavor is reflected in Section 703(a) of Title VII (42 U.S.C. 2030(e)2(a)), which reads:

(a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Discrimination against any individual on the basis of race in any apprenticeship or training program is also specifically prohibited by Section 703(d) [42 U.S.C. 2000(e)(2)(d)], which provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint

labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

During the lengthy debates which preceded this legislation, many employers and legislators expressed fear that the equal employment provisions of the 1964 Civil Rights Act would be construed to require the hiring of minority group personnel on the basis of quotas in order to rectify existing imbalances in employment. To placate these concerns, Section 703(j)[3] was placed in the Act as a compromise, so as to clarify that the equal employment provisions of the 1964 Act were not intended by the Congress to require that preferential treatment be given any individual or group because of an imbalance that might exist with respect to the total number or percentage of persons of any race, color, religion or

[3] Section 703(j), 42 U.S.C. § 7000(e)(2)(j) reads:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

sex employed in comparison with the total number or percentage of such persons in that area. See generally, *The Civil Rights Act of 1964*, BNA Operations Manual (1964):

In this case Kaiser asserts support for the discrimination against its white employees brought about by its aforesaid affirmative action program in the fact that Section 703(j), while providing that the equal employment provisions of the 1964 Act were not to be interpreted as requiring quotas, does not, within the four corners of that subsection, prohibit quotas in employment or training programs.

After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibition against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in sections 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to accept what many consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

Kaiser further seeks to justify the racially discriminatory effects of the quota system which it has

adopted by analogizing its affirmative action program to those mandated by United States Courts in response to lawsuits brought by minority group employees under the provisions of Title VII of the Civil Rights Act. It would be well, therefore, briefly to review the history of such court involvement.

After the effective date of the 1964 Act, the courts were deluged with cases alleging employment discrimination, and were left to impose relief commensurate with the nature of the violation. In *Louisiana v. United States*, 225 F.Supp. 353, 393, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) the Supreme Court for the first time considered the scope of authority of the judiciary to fashion such relief. Its conclusion was that the courts had not only the power but the duty to render decrees which would "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States, supra*, at 380 U.S. 154.

The lower courts thereafter began exercising this authority realizing that in some cases affirmative action programs were necessary to effectuate the purpose of the 1964 Act. For example, in the case of *Local 53 of Int. Ass'n. of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the Court explained:

> "In formulating relief from such practices the Courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' United States v. La., E.D. La. 1963, 225 F.Supp. 353, 393, aff'd 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709" *Vogler, supra*, at p. 1052.

Additionally, the Court said in *Vogler:*

> "Where necessary to ensure compliance with the Act, the district court was fully empowered to eliminate the present effects of past discrimination. United States v. Local 189, United Papermakers & Paper Workers, E.D. La. 1968, 282 F.Supp. 39, 45; Quarles v. Phillip Morris, Inc., E.D. Va. 1968, 279 F.Supp. 505, 516. See also, Louisiana v. U.S. 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra*, at pp. 1052, 1053.

cf, United States v. United Bro. of Carpenters & Joiners of America, Local 169, 457 F.2d 210 (7th Cir. 1972).

As in the *Vogler* case, the courts most frequently exercised their authority to fashion affirmative relief in cases where the employment scheme in question was found to be neutral on its face, but had the effect of perpetuating the effects of past discrimination. See *United States v. Wood, Wire and Metal Lath. Int. v. Loc. No. 46*, 471 F.2d 408 (2d Cir. 1973); *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478 (W.D.N.C. 1970); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, 92 S. Ct. 447, 30 L.Ed.2d 367 (1971).[4]

[4] See also, *United States v. Wood, Wire and Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir. 1973); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950, 92 S. Ct. 2045, 32 L. Ed. 2d 338 (1972); *Contractors Association of Eastern Pennsylvania v. Sec. of Labor*, 442 F.2d 159, 173 n. 43 (3d Cir. 1970), cert. denied 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed. 2d 95 (1971).

As the courts began to impose quota systems and other affirmative action programs on a case-by-case basis, however, many employers contested such authority arguing that Sec. 703(j) of the Civil Rights Act prohibited anyone from granting preferential treatment to a given class.

In the case of *United States v. International Bro. of Electric Workers Local No. 38*, 428 F.2d 144 (6th Cir. 1960), the Court explains the seemingly incongruent relationship between affirmative relief and preferential treatment thusly:

> "When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with §2000(e) (2) (j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices." *Int'l Bro. of Electrical Workers, supra*, at p. 149.

Accordingly, from the principles espoused in *Louisiana v. United States, supra*, and its progeny, it is well established that the judiciary may establish affirmative action programs as a form of relief in certain Title VII cases without running afoul of sections 703(a), 703(d) or 703(j) of the 1964 Act.

At first blush, it might appear inconsistent that the Act on one hand makes unlawful the establishment by employers of affirmative action programs while on the other hand permits, if not requires, the

courts to fashion similar relief in certain cases. Upon reflection, however, substantial distinctions become apparent.

The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

There are other logical and compelling reasons for distinction between employer action and court action. First, because relief of this nature should be imposed with extreme caution and discretion, and only in these limited cases where necessary to cure the ill effects of past discrimination, the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. Further, the administration of such relief by the courts tends to assure that these remedial programs will be uniform in nature and will exist only as long as necessary to effectuate the purposes of the Civil Rights Act.

Even though the courts may establish affirmative action relief, they have been reluctant to impose quota systems like that in question here, for they recognize that such programs are at best inequitable. In a very recent case, *Kirkland v. New York*, 520 F.2d 420 (2d Cir. 1975), the court made the following observation:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have

recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." *Kirkland, supra* at p. 429.

Thus, the courts are cognizant of the undesirable effects accompanying quota systems, and, accordingly, have established such systems only in factually limited circumstances. For example, the courts in recent decisions have refused the invitation to impose such affirmative action plans without first being convinced that those seeking relief have themselves been the subject of past discrimination. In the case of *Watkins v. United Steel Workers of Am., Local No. 2369*, 516 F. 2d 41 (5th Cir. 1975), the Fifth Circuit Court of Appeals held that even though the use of a seniority system to lay off employees may result in the discharge of more blacks than whites, the discharge system was not discriminatory where the individuals who suffered the layoffs were in their "rightful place"[5] since they had never personally experienced prior employment discrimination.

The Court in *Watkins* said, "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites." *Watkins, supra*, at p. 50.

[5] For a full discussion of the "rightful place" theory see *United States v. Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39 (E.D. La. 1968) aff'd 416 F.2d 980 (5th Cir. 1969).

In another very recent case, *Chance v. Board of Examiners of the Board of Education of the City of New York*, 44 L.W. 2243-2344, ___ F.2d ___ (2d Cir. 1976), the Court analyzed the imposition of a quota system the effect of which was to require a senior, more experienced white employee to stand aside and forego the seniority benefits guaranteed him by the New York Education Law, solely because a younger, less experienced employee was black. The *Chance* case was a civil rights class action which began in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City School System. The United States District Court for the Southern District of New York directed the Board of Education of the City of New York to excess supervisory personnel in accordance with a formula imposing racial quotas upon the excessive process. Excessing rules are very similar to the principles of seniority inasmuch as excessing rules provide, in brief, that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. As the Court of Appeals recognized, the inevitable consequences of the racial quotas preventing the excessing of a black or Puerto Rican are that a white person with greater seniority must be excessed in his place. In reversing the District Court's decision, the Second Circuit explained:

"Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII, and they are in accord that this Act

was not intended to invalidate bona fide seniority systems. Waters, supra, 502 F.2d at 1318; Jersey Central, supra, 508 F.2d at 710. Our brothers in the Fifth Circuit say that 'regardless of what that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.'" *Chance, supra,* at 6594.

The Court further stated that if a minority worker had been kept from his "rightful place" on the seniority lists by the use of discriminatory examinations, or other discriminatory practices, he may in some instances, be entitled to preferential treatment. Reasoning, however, that such preferential treatment should be given not because the man is black, but because he had been discriminated against, the Court observed:

> "The 'freedom now' and 'rightful place' doctrines create constructive or fictional seniority to put minority employees in the appropriate spot on the seniority list that they would have occupied had they not been the subject of discrimination. Local 189, United Papermakers v. United States, supra, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the later involves only the filling of vacancies. We have followed the

> 'rightful place' doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971)." *Chance, supra,* at 6597.

Since the evidence received during the trial of the case sub justice established that the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their 'rightful place' in the plant. Accordingly, a plant-wide seniority system at Kaiser's Gramercy plant would have adequately ensured that its minority employees were receiving those benefits commensurate with their seniority. Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority. Thus, applying the rationale developed in *Watkins* and *Chance* to the facts of this case, the Court must conclude that an affirmative action quota system such as that imposed by Kaiser would have been inappropriate for the Gramercy plant, even if defendants were correct in their contention that employers have some right to discriminate by analogy to those cases where courts have ordered affirmative relief programs.

In reaching its conclusion that the discriminatory provisions of Kaiser's affirmative action program violate specific proscriptions of Title VII of

the 1964 Civil Rights Act, this Court is well aware that similar programs have been adopted, before and after enactment of the 1964 Act, by many employers in the private and public sector, often because of pressure from various agencies of the Executive Branch of the United States Government. Undoubtedly, the laudible objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the 1964 Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary. Numerous policy decisions of monumental importance to the

nation necessarily would have to be made in creating exceptions to Sections 703(a) and (d) of the 1964 Act, and the type of Congressional scrutiny and public debate such as that reflected in the legislative history of the 1964 Act would ensure that competing interests could be balanced in a fashion consistent with the democratic processes pursuant to which the 1964 Act itself was adopted.

Accordingly, judgment will be entered in favor of plaintiffs, and against defendants, granting a permanent injunction restraining defendants from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race.

New Orleans, Louisiana, this 12 day of June, 1976.

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Aciton No. 74-3510 Section "I"

BRIAN F. WEBER, Individually and
on Behalf of all other persons
similarly situated

VERSUS

KAISER ALUMINUM & CHEMICAL
CORPORATION AND UNITED STEELWORKERS
OF AMERICA AFL-CIO

JUDGMENT

This cause came on for trial before this Court on plaintiffs' request for a permanent injunction.

After hearing the evidence, the Court took the matter under submission.

Now, therefore, for the written reasons of the Court on file herein, and considering the direction of the Court as to the entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Brian F. Weber, Individually and on behalf of all other persons

similarly situated, and against defendants, Kaiser Aluminum & Chemical Corporation and United Steelworkers of America AFL-CIO, granting a permanent injunction restraining defendants from denying plaintiffs, Brian F. Weber and all other members of the class access to on-the-job training programs on the basis of race.

Dated at New Orleans, Louisiana, this day of June, 1976.

JACK M. GORDON
United States District Judge

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432
No. 78-435
No. 78-436

UNITED STEELWORKERS OF AMERICA

and

KAISER ALUMINUM & CHEMICAL CORPORATION

and

THE UNITED STATES OF AMERICA, *Petitioners*

v.

BRIAN F. WEBER, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1978
CERTIORARI GRANTED DECEMBER 11, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432
No. 78-435
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and

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THE UNITED STATES OF AMERICA, *Petitioners*

v.

BRIAN F. WEBER, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3266

BRIAN F. WEBER, ET AL., *Plaintiffs-Appellees*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Defendants-Appellants*

DATE	FILINGS—PROCEEDINGS
8/30/76	Order of the Court denying motion of appellant, Kaiser Aluminum & Chemical Corporation, for stay of injunction pending appeal
9/9/76	Order of the Court denying motion of appellant, United Steelworkers of America, for stay of injunction pending appeal
2/18/77	Order of the Court granting motion of United States and Equal Employment Opportunity Commission for leave to file brief as amicus curiae
3/16/77	Order of the Court granting motion of Anti-Defamation League of B'nai B'rith for leave to file amicus curiae brief
3/21/77	Order of the Court granting motion of Great Plains Legal Foundation for leave to file amicus curiae brief
3/28/77	Argument & Submission
3/28/77	Order of the Court granting motion on behalf of Southeastern Legal Foundation for leave to file amicus curiae brief
11/17/77	Opinion of the Court

11/17/77	Judgment of the United States District Court for the Eastern District of Louisiana affirmed
4/17/78	Opinion—Order Denying Rehearing & Rehearing En Banc
5/1/78	Order of the Court granting motion of appellant, Kaiser Aluminum & Chemical Corporation, for stay of mandate pending petition for writ of certiorari
1/11/79	Clerk's certification of the transcript

Docket Entries

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

No. 74-3510

WEBER v. KAISER ALUMINUM & CHEMICAL CORP. and
UNITED STEELWORKERS OF AMERICA

DATE	PROCEEDINGS

12/31/74 Complaint; 2 summons issued and ORDER (JMG) that the application for preliminary injunction is set for hearing on 2-5-75 at 4 p.m. 12-31-74. ent 1-2-75

1/8/75 M.R. on summs. & Order served United Steelworkers through Barney Morel; serv. Kaiser Aluminum through J. B. Phelps, both on 1/3/75

1/8/75 Pltf's mtn. & ORDER that Michael R. Fontham is appointed counsel for Brian F. Weber & that pltf. be permitted to proceed in forma pauperis. (JMG) Ent. 1/14/75

1/14/75 ORDER to determine Class Action as per Rule 23 (c)(1), FRCP. (JMG) Ent. 1/14/75

1/24/75 Mtn. of deft. Kaiser Alum. & Chem. & ORDER that mover be granted an add'l. delay within which to file pldgs. until 2/7/75. (JMG) 1/23/75. Ent. 1/24/75

1/24/75 M.E. & ORDER that a Status Conf. be set for 2/13/75 at 9:30 A.M. (JMG) 1/23/75. Ent. 1/27/75

1/28/75 ANSWER of United Steelworkers of America, AFL-CIO to complaint

1/23/75 Mtn. of deft. Kaiser Aluminum & Chemical Corp. & ORDER that mover be granted an add'l. delay within which to file pldgs. until 2/7/75. (JMG) 1/29/75. Ent. 1/30/75

2/7/75 ANSWER of Kaiser Aluminum & Chemical Corp. to pltf's complaint

2/14/75 Pltf's Class Action Allegations.

2/25/75 M.E., Status Conf. held 2/13/75 & ORDER that a hrg. be set for 3/19/75 at 10 A.M. to determine whether this case is to be maintained as a class action; that a pre-trial conf. is set for 3/19/75 at 9:30 A.M.; that trial is set for 4/4/75. (JMG) 2/13/75. Ent. 2/26/75

3/4/75 M.E. & ORDER that the trial prev. set for 4/4/75 is reset for 3/31/75 at 9 A.M. (JMG) 3/3/75. Ent. 3/4/75

3/7/75 Pltf's mtn. to maintain class action; Memo; Hrg. 3/19/75 at 10 A.M.

3/10/75 Response of deft. United Steelworkers of America to Class Action Allegations

3/19/75 Approved form of notice by Order of the Court re equal employment opportunity in selection for on-the-job training programs. (JMG) Ent. 3/19/75

3/19/75 Hrg. on pltf's mtn. to maintain class action held this date & ORDER that this suit be maintained as a class action pursuant to Rule 23(b)(2), FRCP; FURTHER ORDERED that copies of the Approved Form of Notice be posted by defts. on all employees bulletin boards, etc. on or before 3/21/75. (JMG) Ent. 3/19/75

3/19/75 Response of deft. Kaiser Aluminum to pltf's class action allegations

3/19/75 Response of deft. Kaiser Aluminum to pltf's mtn. to maintain class action

3/19/75 Hrg. to determine whether to maintain a class & hrg. on pltf's mtn. to maintain a class action; these matters were heard at Pre-trial conf. on this date; all parties agreed to submit an Order, etc. (JMG) Ent. 3/20/75

3/20/75 Request for subpns. by M. R. Fontham, Esq. (3 sets issd.)

DATE PROCEEDINGS

4/1/75 TRIAL (non-jury): Testimony heard; parties to file simultaneous briefs by 5/1/75 with reply briefs due by 5/12/75, after which time this matter will be taken under SUBMISSION.

4/1/75 Deft. United Steelworkers of America, AFL-CIO mtn. for involuntary dismissal

4/1/75 Joint stipulation as to facts and exhibits attached

3/31/75 M.R. on subpns. executed as to F. H. Maurin thru wife; as to P. J. Roussel thru wife; & as to Dennis E. English pers., all on 3/24/75

5/20/76 TRO: ORDERED that defts be restrained and enjoined from enforcing the provision of the 1974 Labor Agreement between Kaiser Aluminum & Chem. Corp. and United Steelworkers of America AFL-CIO requiring that at least one minority employee shall be selected for training programs at the Gramercy, La. works for every non-minority employee that is selected for the training programs. Order expires 5/20/76. (JMG) ent 5/21/76.

6/1/76 Pltf's mtn. for re-issuance of TRO & ORDER that defts. Kaiser & United Steelworkers are restrained & enjoined from enforcing the provision of the 1974 Labor Agreement between Kaiser & United Steelworkers requiring that at least 1 minority employee shall be selected for training programs at Gramercy, La. works for every non-minority employee that is selected for the training programs. Order expires 6/13/76. (JMG) 6/3/76. Ent. 6/4/76

6/4/76 M.R. on TRO served Kaiser Alum. thru Frieda Boughton 5/24/76; served Barney Morel thru Mrs. Wegmann 5/21/76

6/17/76 COURT OPINION: Judgment will be entered in favor of pltfs. agst. defts. granting a permanent injunction restraining defts. from denying Mr. Weber & the other members of the class access to on-the-job training programs on the basis of race. (JMG) Ent. 6/17/76

6/22/76 JUDGMENT in favor of pltfs. Brian F. Weber, individually & on behalf of all other persons similarly situated, & agst. defts. Kaiser Alum. & Chem. Corp. and United Steelworkers of America AFL-CIO, granting a permanent injunction restraining defts. from denying pltfs. Weber & all other members of the class access to on-the-job training programs on the basis of race. (JMG) 6/21/76. Ent. 6/23/76

CLOSED CASE

6/29/76 Pltfs' mtn. to award reasonable attorneys fees & costs; Hrg. 8/18/76 at 10 A.M.; Memo.

7/13/76 Deft., Kaiser Aluminum's mtn. & ORDER that the deft's mtn. to suspend, pending appeal, the permanent injunction issued on 6/23/76 is DENIED. (JMG) Ent. 7/13/76

7/14/76 NOTICE OF APPEAL by deft. Kaiser Aluminum & Chemical Corp. from the final judg. entered on 6/23/76. (Notices sent to the U.S. Court of Appeals, Court Reporter, M. R. Fontham, F. W. Middleton, Jr., John C. Falkenberry & Jerry L. Gardner, Jr.)

7/14/76 Deft. United Steelworkers mtn. & ORDER that the mtn. for Stay pending Appeal be DENIED. (JMG) Ent. 7/15/76

7/14/76 NOTICE OF APPEAL by deft. United Steelworkers of America, AFL-CIO from the judg. granting a permanent injunction dated 6/21/76 (Notices sent to the U.S. Court of Appeals, Court Reporter, M. R. Fontham, F. W. Middleton, Jr., John C. Falkenberry & J. L. Gardner, Jr.)

DATE PROCEEDINGS

7/14/76 Bond for costs in the sum of $250.00 by United Steelworkers of America AFL-CIO

7/21/76 Appellant, deft. Kaiser Aluminum's designation of transcript and record on appeal

8/18/76 Hrg. on mtn. of pltfs. to award reasonable attorneys fees & costs—GRANTED; FURTHER ORDERED that the Court's Order as to attorneys fees be STAYED pending further Court action in this matter. (JMG) Ent. 8/19/76

8/19/76 Deft. Kaiser's mtn. & ORDER that the time for transmitting the record to the Ct. of Appeals is extended for an add'l. 40 das. until 10/2/76. (JMG) Ent. 8/23/76

9/1/76 ORDER (c.c.) of U.S. Court of Appeals that the mtn. of appellant, Kaiser Alum. for stay of injunction pending appeal is DENIED.

9/10/76 ORDER (c.c.) of U.S. Court of Appeals that the mtn. of appellant, United Steelworkers of America, AFL-CIO, for stay of injunction pending appeal is DENIED.

9/24/76 Court Reporter's transcript of proceedings taken in open court on 4/1/75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRIAN F. WEBER, Individually and On Behalf Of All Other Persons Similarly Situated

VS.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA AFL-CIO

CIVIL ACTION No. 74-3510

COMPLAINT

1.

This is a civil action brought by Brian F. Weber, plaintiff, on his own behalf and on behalf of all other persons similarly situated, for preliminary and permanent injunctions to prevent deprivation of certain rights guaranteed to Mr. Weber and the members of the class by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, and for money damages to redress the injury caused to Mr. Weber and the members of the class by the illegal and discriminatory actions of the defendants. Mr. Weber also requests on his own behalf and on behalf of the members of the class that the Court declare illegal the discriminatory actions of the defendants, who barred Mr. Weber and the members of the class from participating in on-the-job training programs solely because of their race, and that the Court order defendants to cease the use of the discriminatory selection procedure for training programs.

2.

Jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 2000(e)-5(f)(3), 28 U.S.C. § 1343, and 28 U.S.C. §§ 2201 and 2202.

3.

Plaintiff, Mr. Weber, is an employee of defendant, Kaiser Aluminum & Chemical Corporation ("Kaiser") at the Gramercy, Louisiana works, and a member of United Steelworkers of America AFL-CIO ("USWA"), Local 5702. This action is brought by Mr. Weber on his own behalf and on behalf of all other employees of Kaiser at its Gramercy works who are members of USWA and who have been discriminated against in selection for on-the-job training programs at Kaiser because they are white. This suit is proper for maintenance as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class. The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

4.

Defendant, Kaiser, is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of California. Defendant, USWA, is a labor union. Kaiser is an employer in an industry affecting commerce and employs more than 15 persons. USWA is a labor organization engaged in an industry affecting commerce which procures employees for Kaiser or procures for employees opportunities to work for Kaiser at its Gramercy works, which has more than 15 members, and which is the certified representative of employees of Kaiser at the

Gramercy works pursuant to the National Labor Relations Act.

5.

On February 1, 1974, Kaiser and USWA entered into an agreement styled "1974 Labor Agreement" purporting to set forth "the basic agreement concerning rates of pay, hours of work, and conditions of employment to be observed between the parties hereto with respect to the employees covered hereby and as hereafter defined." The agreement provides in part:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio: [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .
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> • • •
>
> The term "minority" as used herein shall be as defined in EEOC reporting requirements.

The agreement also states that this and certain other provisions of the agreement are "remedial" measures adopted in response to pending litigation concerning minority and female employment.

6.

In April, 1974, Mr. Weber was employed as a lab analyst at the Gramercy Works of defendant Kaiser. A company

"bid" for on-the-job training programs in the "Instrument", "General Repairman" and "Electrician" categories was posted by defendant Kaiser. Pursuant to defendants' standard procedure, applicants were to be selected for those programs on the basis of seniority. However, a condition of the bid was that at least half of the persons selected as prospective trainees would be applicants who were members of minority groups.

7.

Mr. Weber and the members of the class applied for the training programs announced in the April, 1974 bid and were fully qualified for the programs. However, members of minority groups with less seniority than Mr. Weber and the other members of the class were selected preferentially by defendant Kaiser for these programs to meet the established quota of at least 50 per cent minority representation. Mr. Weber and the other members of the class with greater seniority than members of minority groups selected for one, two or all three of the training programs were therefore denied entry into the training programs solely on the basis of discriminatory racial criteria.

8.

Subsequent to the acceptance of applicants in these training programs, another company bid was posted for applicants for one position in another training program in the "Insulator" category. This bid barred applications by Mr. Weber or any member of the class, as the bid was specifically limited to minority employees only.

9.

The on-the-job training programs offer opportunities for employees such as Mr. Weber to enter employment positions offering a higher rate of pay than Mr. Weber or the members of the class presently enjoy. Mr. Weber now

makes $6.23 per hour; after graduation from a training program, he would receive approximately $6.70 per hour. Moreover, a position secured after completion of one of the training programs would allow the employee to work a straight day shift rather than a night shift. Furthermore, this position would allow the employee to make additional overtime wages and collect additional maintenance payments. In addition, this position would provide greater employment security. The training programs involve substantial benefits and would provide the means for job advancement for Mr. Weber and the other members of the class.

10.

The defendants have no no legitimate reason, under the law, for denying Mr. Weber and the other members of the class equal access to the training programs of defendant Kaiser. On the contrary, the discriminatory policies of defendants are arbitrary and capricious and the discrimination against Mr. Weber and the other members of the class is based entirely on race. None of the minority applicants who were selected for the training programs pursuant to the discriminatory criteria of defendants had previously been discriminated against by defendants by a denial of opportunity to enter these or other training programs, a denial of opportunity to obtain seniority, or in any other job-related fashion. The selection policies of defendants for the training programs constitute a bald attempt to advance the members of minority races in their job classifications by discriminating against members of another race who are equally qualified and possess greater seniority.

11.

The arbitrary and capricious policies of defendants constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, and 42 U.S.C. § 1981. The arbitrary and capricious racial dis-

crimination of defendants constitutes a violation of the specific provisions of 42 U.S.C. § 2000(e)-2(d) relative to "training programs."

12.

Neither the State of Louisiana nor the City of New Orleans has a law prohibiting discrimination in employment on grounds of race. Mr. Weber sought redress of the grievances in this Complaint through defendants' grievance procedures, but this effort was unsuccessful. Mr. Weber filed a timely charge with the Equal Employment Opportunity Commission. On December 5, 1974, the Notice of Right to Sue Within 90 Days was filed in this Court and given the designation Sundry 416, Section "I."

WHEREFORE, plaintiff, Mr. Weber, prays for judgment as follows:

1. That this Court declare the aforementioned discriminatory actions of defendants illegal;

2. That this Court issue preliminary and permanent injunctions restraining defendants from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race;

3. That this Court order defendants to account to Mr. Weber and the other members of the class for the hourly wages and other benefits lost as the result of the illegal actions of defendants;

4. That defendants be ordered to pay for all costs of this proceeding, including the reasonable attorney fees incurred by Mr. Weber; and

5. That this Court grant any and all other relief that is judicially or equitably proper.

/s/ MICHAEL R. FONTHAM
Michael R. Fontham

of

STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: 581-3200
Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

ANSWER

Comes now defendant United Steelworkers of America, AFL-CIO, and for answer to the complaint filed herein, states as follows:

1. As to the allegations of paragraph 1 of the complaint, it is true that this Court has subject matter jurisdiction over actions brought pursuant to Title VII of the Civil Rights Act of 1964, and defendant admits that this action is brought by plaintiff Weber pursuant to said statute. However, defendant denies all other allegations of said paragraph.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. As to the allegations of paragraph 3 of the complaint, it is true that plaintiff Weber is an employee of Kaiser Aluminum & Chemical Corporation at the Gramercy, Louisiana works, and that he is a member of Local 5702, United Steelworkers of America, AFL-CIO. All other allegations of said paragraph are denied.

4. As to the allegations of paragraph 4 of the complaint, it is true that this defendant is a labor organization engaged in representing employees in an industry affecting commerce and that it has more than fifteen members. Defendant is the certified collective bargaining representative for production and maintenance employees only at the Kaiser-Gramercy works. It is not true that this defendant either procures employees for Kaiser or procures for employees opportunities to work for Kaiser at its Gramercy works. Upon information and belief, defendant admits that Kaiser Aluminum & Chemical Corporation is an employer

engaged in an industry affecting commerce, that it employs more than fifteen persons, and that it is a Delaware corporation having its principal place of business in the state of California.

5. Defendant admits the allegations of paragraph 5 of the complaint.

6. Defendant admits the allegations of paragraph 6 of the complaint.

7. As to the allegations of paragraph 7 of the complaint, defendant admits that plaintiff Weber applied for the training programs as alleged in said paragraph, however, defendant is without knowledge as to Mr. Weber's qualifications for such programs, and therefore the allegation that he was fully qualified must be denied. It is true as alleged in paragraph 7 that members of minority groups with less seniority than plaintiff were selected for such training programs, however, it is not true that they were selected preferentially or for any other invidious reason. All other allegations of said paragraph are denied.

8. As to the allegations of paragraph 8 of the complaint it is true, as alleged that a bid was posted for applicants for an insulator training program, however defendant denies that the filling of this vacancy by a minority employee amounted to any discrimination against the plaintiff.

9. As to the allegations of paragraph 9 of the complaint, inasmuch as defendant has no knowledge of plaintiff's present rate of pay, defendant cannot admit such allegation, and therefore the allegation must be denied.

10. Defendant denies the allegations of paragraph 10 of the complaint.

11. Defendant denies the allegations of paragraph 11 of the complaint.

12. Defendant denies the allegations of paragraph 12 of the complaint, except that defendant admits that neither the State of Louisiana nor the City of New Orleans has a law prohibiting racial discrimination in employment.

13. Defendant denies that plaintiff is entitled to any of the relief prayed for in the complaint.

Now having answered plaintiff's complaint and each and every paragraph thereof, for further answer to said complaint defendant states as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The complaint is barred by the applicable Statute of Limitations.

THIRD DEFENSE

The complaint fails to affirmatively allege that defendant complied with the jurisdictional prerequisites to suit contained in Title VII of the Civil Rights Act of 1964.

FOURTH DEFENSE

This action is not properly maintainable as a class action pursuant to Rule 23, Federal Rules of Civil Procedure.

FIFTH DEFENSE

Defendant denies that it has discriminated against any persons in violation of Title VII of the Civil Rights Act of 1964.

COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

/s/ By JOHN C. FALKENBERRY
John C. Falkenberry

DODD, BARKER, BOUDREAUX, LAMY & GARDNER
711 Carondelet Building
New Orleans, Louisiana 70130
(504) 522-7265

/s/ By JERRY L. GARDNER, JR.
Jerry L. Gardner, Jr.

Attorneys for defendant, United Steelworkers of America, AFL-CIO

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

ANSWER OF DEFENDANT, KAISER ALUMINUM & CHEMICAL CORPORATION

Now Into Court, through undersigned counsel, comes Kaiser Aluminum & Chemical Corporation, made defendant herein, and answers plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This action is not properly maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Third Defense

This defendant denies that, with regard to any of the circumstances complained of in the complaint, this defendant has discriminated against any persons in violation of Title VII of the Civil Rights Act.

Fourth Defense

1.

Answering paragraph (1) of the complaint, this defendant admits the nature of the suit and the relief demanded, but this defendant denies all of the other allegations of the said paragraph, and particularly denies plaintiff of the alleged class he purports to represent is entitled to the relief sought or that there has been any violation whatsoever of the terms of the Civil Rights Act by this defendant, and further denies that plaintiff is entitled to bring this action as a purported class action.

2.

This defendant admits the allegations of paragraph (2) of the complaint.

3.

Answering paragraph (3) of the complaint, the defendant admits that plaintiff is employed by this defendant at its Gramercy, Louisiana Works and that plaintiff is a member of Local 5702 of United Steelworkers of America, AFL-CIO, but this defendant denies all of the other allegations of the said paragraph.

4.

Answering paragraph (4) of the complaint, this defendant admits its status and domicile and that defendant, USWA, is a labor organization in an industry affecting commerce, has more than 15 members, and is the certified representative of the employees of Kaiser at the Gramercy Works, but this defendant denies all of the other allegations of the said paragraph.

5.

This defendant admits the allegations of paragraph (5) of the complaint, but, further answering said paragraph, alleges that said agreement is the best evidence of its terms and of its contents and this defendant specifically pleads all of said terms of said contract and of the "memorandum of understanding" supplemental thereto.

6.

Answering paragraph (6) of the complaint, this defendant admits that plaintiff was employed in April, 1974, as a lab analyst at defendant Gramercy Works; and defendant further admits that bids for on-the-job training program were posted for a number of crafts, including those listed by plaintiff, and further admits that bids for such training,

had the condition that at least half the persons selected, be applicants who were members of minority groups, but, this defendant denies all of the other allegations of said paragraph and alleges that said posting and said bids and the selection of trainees was conducted strictly in accordance with the procedures outlined in the 1974 Labor Agreement and in the memorandum of understanding reached thereunder.

7.

Answering paragraph (7) of the compliant, this defendant admits that plaintiff (and others) applied for selection for training programs posted and further admits that in some cases members of minority groups, with less seniority than other bidders, not members of minority groups, were selected for such training in order to comply with the terms of the 1974 Labor Agreement and the memorandum of understanding thereunder, but defendant denies all of the other allegations of the said paragraph.

8.

Answering paragraph (8) of the complaint, this defendant admits that bid was posted for applicants for one position as trainee in the category of "insulator" and that, in order to meet the requirements of the 1974 Labor Agreement and the memorandum of understanding thereunder, applicants were limited to minority employees only, but this defendant denies all of the other allegations of the said paragraph.

9.

Answering paragraph (9) of the complaint, this defendant admits that successful completion of the training programs, referred to in plaintiff's complaint, allows employee to a job classification with a higher rate of pay than the rate at which plaintiff was employed at the time bids for such training programs were posted; defendant further admits that the job classification and the situation, of one successfully completing the aforesaid training programs, is considered by many to offer desirable aspects and advantages, but defendant denies all of the other allegations of the said paragraph.

10.

This defendant denies all of the allegations of paragraph (10) of the complaint.

11.

This defendant denies all of the allegations of paragraph (11) of the complaint.

12.

Answering paragraph (12) of the complaint, this defendant admits that neither the State of Louisiana nor the City of New Orleans has a law prohibiting racial discrimination in employment; this defendant further admits that plaintiff filed a charge with the Equal Employment Opportunity Commission and that plaintiff received a "Right to Sue" letter, dated November 29, 1974, but this defendant denies all of the other allegations of the said paragraph.

WHEREFORE, defendant, Kaiser Aluminum & Chemical Corporation, prays that plaintiff's complaint be dismissed and plaintiff's demands denied at plaintiff's costs.

BY ATTORNEYS,
TAYLOR, PORTER, BROOKS & PHILLIPS

/s/ BY: F. W. MIDDLETON, JR. by VPM
F. W. Middleton, Jr.
P. O. Box 2471
Baton Rouge, La. 70821
504/387-3221, Ext. 24

Attorneys for Defendant

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

ORDER

The hearing on plaintiff's Motion to Maintain Class Action was held in Chambers at the Pretrial Conference at 9:30 A.M. on March 19, 1975.

PRESENT:

For Brian F. Weber, Individually and on behalf of all other persons similarly situated, Plaintiffs:

Michael R. Fontham, Esquire

For Kaiser Aluminum & Chemical Corporation, Defendant:

Robert J. Allen, Jr., Esquire
Frank W. Middleton, Jr., Esquire

For United Steelworkers of America AFL-CIO:
John C. Falkenberry, Esquire

On consideration of the agreement of all parties that this case should be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the class described below:

IT IS ORDERED that this suit be maintained as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of the following class:

> All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana works who are members of the United Steelworkers of America AFL-CIO, Local 5702, are not members of a minority group, and have applied or were eligible to apply for on-the-job training programs since February 1, 1974.

IT IS FURTHER ORDERED that copies of the Approved Form of Notice approved by the Court be posted by defendants on all employee bulletin boards at the Gramercy, Louisiana works of defendant, Kaiser Aluminum & Chemical Corporation, and at the Union Hall of Local 5702, United Steelworkers of America AFL-CIO, on or before March 21, 1975.

/s/ JACK M. GORDON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Title omitted in printing)

TRIAL

BEFORE THE HONORABLE JACK M. GORDON, UNITED STATES DISTRICT COURT JUDGE, ON APRIL 1, 1975, AT 9:00 A.M.

REPORTED BY: D. TRENT THURMAN, CSR, RPR

[2]

APPEARANCES:

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Counsel for Kaiser Aluminum &
Chemical Corporation

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COOPER, MITCH AND CRAWFORD
Attorneys at Law
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Birmingham, Alabama

Counsel for United Steelworkers
of America AFL-CIO

[4]

Proceedings

The Court: Be seated. Call the case, please.

The Clerk: Civil Action 74-3510, Brian F. Weber versus Kaiser Aluminum.

The Court: Counsel for the Plaintiff ready?

Mr. Fontham: Yes, Your Honor.

The Court: For the Defendants?

Mr. Middleton: Counsel for Kaiser Aluminum is ready, Your Honor.

Mr. Falkenberry: Counsel for United Steelworkers is ready, Your Honor.

The Court: Gentlemen, just so that we'll have no misunderstanding, I have looked at the Pre-Trial Order. It does not specifically reflect the fact that this is a trial on the merits of the case, rather than a trial on the request for a preliminary injunction. It's the Court's recollection that all parties did agree that this trial today would be on the merits, the request for a permanent injunction, as well.

Mr. Falkenberry: Yes, sir, that's our intention, Your Honor.

Mr. Middleton: Yes, Your Honor. Technically, if it be necessary, we can go ahead and have the trial on the preliminary injunction and stipulate that this [5] record may be complete for the permanent injunction.

The Court: If you're prepared to present all the evidence that you're ever going to present, I think the more orderly way would be to go ahead and have this on the trial on the merits.

Mr. Middleton: All right.

The Court: Do any counsel wish to invoke the rule requiring separation of witnesses?

Mr. Falkenberry: No, sir.

Mr. Middleton: No, sir.

The Court: Anyone wish to make any opening statements?

Mr. Fontham: Your Honor, we waive our opening statement.

Mr. Middleton: We waive ours, Your Honor.

I think the preliminaries have been agreed upon, and the stipulation is what we have presented to the Court.

The Court: Gentlemen, the Clerk has just asked me whether all counsel have been admitted to the Eastern District of Louisiana?

Mr. Falkenberry: No, sir. My understanding is that Mr. Gardner filed a motion to admit for purposes of this litigation. He's not here today, Your Honor, because of the change from yesterday. He met with a conflict in his schedule and because he wasn't going to try it, I don't really know of any [6] communication he actually had with your Clerk. I understand that he talked to him.

The Court: Well, I don't know that there is anything in the record, sir. Just to be sure that you're properly admitted, it could be done informally at this time. The Court will entertain a motion by one of your other counsel in this case, who are members of the Court, to allow you to appear for purposes of this action.

Mr. Falkenberry: I appreciate that, Your Honor. I'll ask Mr. Gardner to accompany this by a formal motion.

The Court: It's not necessary.

Mr. Middleton: If I may, Frank Middleton, I'm admitted, and move, for purposes of this case, that Mr. John Falkenberry of Birmingham, Alabama, be allowed to participate and temporarily admitted for purposes of this case.

The Court: So Ordered.

Mr. Falkenberry: I don't have any desire to make an opening statement.

Yesterday, I delivered a trial memorandum to your office. The Clerk's office was closed, and I don't know whether Your Honor requires or needs that to be filed formally with the Clerk, and if so, I [7] would move that it be filed in open Court.

The Court: I received a copy of it and I'll see that the original copy is filed with the Clerk.

Mr. Falkenberry: Thank you, Your Honor.

The Court: It's this Court's practice, in the past, that memoranda are not officially made parts of the record, and we do have new rules of Court, which were supposed to have been effective January 1st, 1975, but which, pending receipt from the printer, have been delayed. Under the new rules, in order to avoid a situation where we had incomplete records, we're going to provide that all memoranda be provided and filed with the Clerk in duplicate, so that one copy may go to the Judge for his work file and one copy for the record. I think it a much more complete and orderly record, to have everything there, so I'll go ahead and, on my own initiative, file your ribbon copy, so that the record will be complete with all memorandum.

All right, Mr. Fontham?

Mr. Fontham: Your Honor, prior to calling our first witness, all of the parties have a stipulation which we

would like to formally offer and introduce into the record in this case.

We have a stipulation as to the underlying [8] facts of the case. The stipulation also stipulates the authenticity and admissibility of seven documents, the 1974 labor agreement between Kaiser and the Union, a memorandum of understanding with respect to the labor agreement, the bid list on six training programs which are at issue in this lawsuit, which have occurred since the beginning of the agreement, with regard to the 50 percent minority requirement, until the present, and certain exhibits, four exhibits which are offered and introduced into evidence by Kaiser, which the Plaintiff stipulates to the authenticity of, which reflect the makeup of the craft families at Kaiser Aluminum, the minority representation and the all white representation, the trainees selected for the training program since 1974, the craft employees, and a report letter required under the agreement between Kaiser and the Union, and I would like to introduce into evidence the stipulation, Joint Exhibits 1, 2 and 3, and on behalf of Mr. Middleton, we have stipulated Kaiser Exhibits 1, 2, 3 and 4.

The Court: Have you given the stipulation an exhibit number?

Mr. Fontham: No, Your Honor, I haven't. If Your Honor please, we could mark it Joint Exhibit A.

[9] The Court: All right. Why don't you do that?

It's Ordered that Joint Exhibit A, the documents referred to, marked respectively Kaiser 1, 2, 3 and 4, and also, Joint Exhibits 1, 2 and 3, be admitted into evidence.

Mr. Fontham: Your Honor, in addition to that, we have a couple of oral stipulations which the parties have agreed to prior to the trial this morning. One is for the Court's information, and simply for purposes of the record, we would like the record to reflect that an attorney by the

name of Marian Halley, with the Equal Employment Opportunity Commission, has been in touch with all counsel in this case. She has been provided, by me, with copies of the pleadings through the Pre-Trial Order. I understand that the EEOC has some interest in this case, although it decided not to intervene prior to this trial, and that there is some possibility that the EEOC may want to get involved, either with a post-trial brief to Your Honor, or if the case is appealed, at the level of the Fifth Circuit. But all parties wanted the record to reflect that, and I believe both of you all stipulate to that, is that correct?

Mr. Middleton: Yes.

Mr. Falkenberry: Yes.

[10] The Court: The Court, of course, can't be concerned with people who aren't parties to the action. You can put it in the record, but if they wish to participate, they should have intervened.

Mr. Fontham: Secondly, the parties have agreed that with respect to any claim that I may make for attorney's fees, the underlying proof with regard to my time and efforts and so forth will be delayed until Your Honor's decision, to see whether I may have a right to that, and I'll make it by a formal motion, if Your Honor decides in favor of the Plaintiff at some future time.

The Court: I don't see how we can do otherwise. First of all, you don't know how much time you will have spent, at this time.

Mr. Fontham: We're ready to proceed.

The Court: Proceed.

Mr. Fontham: I call Brian Weber to the stand.

BRIAN F. WEBER,

after being first duly sworn, was examined and testified as follows:

Examination

[11] By Mr. Fontham:

Q. State your full name, please.
A. Brian F. Weber.
Q. What is your address?
A. 131 Cedar Street.
Q. What is your age, Mr. Weber?
A. I'm 28.
Q. What is your occupation?
A. I'm a lab analyst for Kaiser Aluminum at Gramercy, Louisiana.
Q. Are you the Plaintiff in this case?
A. I am.
Q. How long have you been employed at the Gramercy works of Kaiser Aluminum?
A. I've been there since November of 1968.
Q. During the course of your employment at Kaiser Aluminum, have you had occasion to apply for on-the-job training programs at Kaiser?
A. Yes. In April of last year, 1974.
Q. Tell the Court what occurred, please.
A. The company put bids on the boards for general repairman trainee, instrument repairman trainee, and electrician trainee. I bid on all three of these jobs.

In awarding the jobs, the company overlooked [12] me for general repair job twice.

Q. Would you explain to the Court what you mean by the "company"?
A. Okay. In awarding the jobs, the company usually goes by seniority. The seniority is a criteria for awarding promotion on job bids. The company chose to fill two of

the vacancies in the general repairman classification by members of employment at Kaiser who have less seniority than me.
Q. What was the reason for the company's decision to use persons with less seniority than you in selections for these training programs?
A. The company was using the 1974 agreement between the United Steelworkers and Kaiser Aluminum, the contract which calls for 50 percent minority—a minimum of 50 percent minority persons to be accepted into the trade and craft trainee jobs.
Q. Were the persons with less seniority than you members of minority groups?
A. Right, they were.
Q. Have you had occasion to have any familiarity with any other training programs at Kaiser?
A. In October of last year, job bids were placed on the board for insulator trainee, for carpenter trainee. I wanted to bid on the insulator trainee job and I [13] was not able to. The bid posted on the board by the company stated that this job would be filled by black employees only, so I was barred from even bidding on that job, as was members of a non-minority group at Kaiser.
Q. Now, were there any other qualifications on these bids, other than seniority and race?
A. No.
Q. Why did you bid for the on-the-job training programs in April?
A. I bid on these jobs to better myself financially. The jobs pay more when I become a full-fledged craftsman. The overtime is much better. I would make a lot more money. The benefits built into the job are greater. The time of work probably would be the day shift, 7:00 to 3:00, which is another benefit, and job security was the big reason. I had much more job security as a craftsman than any other job.

Q. Tell the Court what steps you took to seek redress after you were passed over in the training programs.

A. In April of 1974, I talked to Mr. Dennis English about the fact that I thought that the 1964 Civil Rights law was being violated.

Q. Tell us who Dennis English is.

[14] A. He's an industrial relations superintendent at Kaiser in Gramercy.

Q. Go on.

A. I talked to him about the fact that I thought the '64 Civil Rights law was being violated, insomuch as white employees, including myself, would be discriminated against in the training programs, bids that were then on the board. In April of 1974, a couple of days later, he got in touch with me and said that this was a policy and this was part of the contract and this was how it had to be done. I then filed a grievance through our grievance procedure with the Union, and it was denied, Step 3 and Step 4 in the company, and it was dropped after Step 4 because of the fact that a grievance is an alleged violation of the contract, and this was not a violation of the contract, and it was thus dropped.

I also complained through our committee members at the plant, on the EEOC committee we have at the plant, and it was discussed at an EEOC meeting at the plant site, and the company again said this was part of the contract and they didn't feel they were violating any laws.

I filed a formal complaint with the EEOC, New Orleans District Office, and that was a six month [15] waiting period, and the EEOC has six months to act on a complaint and if they don't at the end of six months, I have a right to seek legal help, which I did at the end of six months, in December. I have seeked legal help and filed suit.

Q. Did the EEOC provide you with a Right-to-Sue letter in this case?

A. They did.

Q. What did you do with that Right-to-Sue letter?

A. I have a copy of it in my briefcase.

Q. Was the original filed into the record in this case, the original of the Right-to-Sue letter was the same one that was filed in this record?

A. Right.

Q. To your knowledge, Mr. Weber, have separate black-white seniority lines ever been maintained at the Gramercy plant?

A. No, never.

Q. Now, how is the seniority requirement for these on-the-job training programs at the Gramercy plant determined?

A. By plant seniority. They're all determined by plant seniority.

Q. Would you explain briefly?

A. The date of hire—the date a person is hired into the [16] plant determines his plant seniority. The length of his service would determine his plant seniority.

Q. Are there any workers hired at the Gramercy plant that aren't covered by plant seniority?

A. No, none.

Q. Are you familiar, Mr. Weber, with the attitude of the white workers at the Gramercy works resulting from the 60 percent quota?

A. Yeah, I am.

Q. What is the basis for that familiarity?

A. I'm familiar with this because of the fact that I have been involved with the Union for several years as a trustee, as a grievance committee man, and also, I'm now presently chairman of the grievance committee. It's continuously a part of my job to deal with everybody on the plant site, all the hourly people on the plant site, in dealing with their problems in regard to any contractual violations or other problems they might have. In so doing, I talk to a majority, I guess, of the people at the plant, and I have

gotten their feelings on the subject of training programs and discrimination.

Q. How has the quota, or the 50 percent minority requirement, affected the racial attitudes of the white workers at the plant?

[17] A. Well, there is no doubt that the quota system used by the company has had a very bad effect on the white workers at the plant. The attitudes, since this training program has been put into effect, have gotten much worse, and the racial relations of the white workers toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves.

Q. How has the quota affected the loyalty of the workers to Kaiser and the Union?

A. Well, probably the same way. The quota system has had a bad effect on the loyalty toward the company and the Union, and so, much of the employees feel that the company and the Union are working against them, not for them, in advancement and promotions to jobs that they might better themselves. They feel that they're being held back. I guess the general attitude among the white workers is very bad and probably gets worse. They would have gotten a lot worse, I admit, had it not been for the fact that last year, last April, I initiated this formal complaint through the EEOC and through the courts, which brought me as a flag bearer, I guess you would say, who was [18] fighting this case, and the employees at the plant were looking to me for an answer, looking to me for this court suit, to see how things would come out.

Q. You mean, you think this mollified them to some extent?

A. No doubt it has calmed down the employees at the plant a great deal, because of the fact that they know this has been challenged.

Q. How has the quota affected the workers' desire to be productive?

Mr. Falkenberry: We object to this, and I know this is a non-jury trial, but I think this is a little speculation, now.

The Court: Do you feel you can lay a better foundation, Mr. Fontham?

Mr. Fontham: I don't know that I can lay a better foundation, but I think that Mr. Weber's testimony that he's the head of the grievance committee and that he speaks to the vast majority of the workers at the plant on a daily basis is a firm foundation for this testimony. I admit, Your Honor, it's the last question I have for Mr. Weber.

The Court: Well, I mean, you haven't asked him if he knows or if he has an opinion if it's affected production and what he bases that opinion on. Perhaps the objection would be withdrawn if some [19] foundation is shown as to his knowledge of production. So far, he's talked about attitudes, which comes before the grievance committee. I'm not sure that I'm of the opinion that production, or lack thereof, is something that the grievance committee would consider.

Mr. Fontham: Perhaps I could phrase the question in a manner I really intended it, because I'm intending to ask a question about attitudes, rather than, actually, company production.

By Mr. Fontham:

Q. Mr. Weber, how has the quota affected the desire or the attitude of the workers with regard to productivity?

A. The quota system, again, has affected the attitudes of the workers towards productivity in a very bad way because of the fact that it takes away from the initiative of the individual employee to do more, to do one step

further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company. So, thus, his attitude does affect productivity in a bad way.

Mr. Fontham: Thank you very much. I have no further questions.

[20] By Mr. Middleton:

Q. Mr. Weber, do you recall whether or not there had been any prior on-the-job training programs in which you sought to participate, prior to the institution of the procedure under the 1974 agreement?

A. There were prior training programs, but I was not allowed to participate because I didn't have the training required by the company, at that time.

Q. I see. Do you recall how many jobs have been created in the training programs instituted since the 1974 agreement?

A. I think it's 13, I'm not positive.

Q. These have been subject to the 50 percent quota that you referred to?

A. Correct.

Q. So, you're talking, really, then, about just six training possibility jobs that are involved here in your discussion of employee attitudes and positions?

A. At this point, it's six. Probably be a lot more in years to come.

Q. Are these particular craft jobs, for which training programs have geen instituted, skilled jobs, to your knowledge and understanding? When one finishes the program, he's a skilled worker?

A. Right, he's a craftsman.

[21] Q. A journeyman?

A. Correct.

Q. It requires a great deal of training and experience that one cannot get in the absence of a training program of some kind?

A. Right.

Q. Prior to the institution of this program, Mr. Weber, were you familiar with how many trained craftsmen there may have been in the plant, of the black race?

A. I'm not familiar how many black employees at the plant were qualified craftsmen. There were several, maybe two or three in the carpenter classification, or insulator classification. There was one in the general repairman classification.

Q. As a matter of fact, Mr. Weber, is it not true that the blacks in these skilled crafts were very low in proportion to the general population percentage of blacks and even of the plant population of blacks?

A. Yes, sir.

Q. Would you have any explanation, from your experience as an employee of the plant and as one of the officials of the local Union, as to why that was?

A. Well, the fact that, I guess, nationwide, more so in our general area of Gramercy, there weren't many blacks who were qualified, who were trained to become [22] craftsmen.

Q. The blacks, in general, just haven't had an opportunity heretofore to participate in training or educational programs to qualify for these skills, is that not correct, sir?

A. Because of their lack of training and schooling, yes.

Q. Well, for anyone to be qualified, he has to have had schooling or training or some sort of an apprenticeship program, is that not right?

A. No. Are you saying that if a man goes to trade school for three years, that's not an apprenticeship program?

Q. Either an extended educational program or an extended apprenticeship program, one or the other, sometimes both?

A. Sure.

Q. Those have not been available to the black population, in general, in the area in which the plant's located, is that my understanding?

A. Yes, sir, but not only to black employees.

Q. So that as a result, the maintenance and crafts forces at the Kaiser plant and most of the other plants in this area are substantially white, predominantly white, are they not?

A. They are.

[23] Q. As I understand it, you feel that these craft jobs are quite desirable, both on an economic and on a job security basis?

A. They are.

Q. By job security, you mean just job security with your plant employer, or the ability to obtain employment elsewhere in the community?

A. When I talk about job security, I mean to a large degree with my employer, and to some degree if I should get laid off in years to come, that I can find employment elsewhere.

Q. Is it your understanding, as the spokesman for your group of people, that, in general, these jobs are sought after and considered highly desirable for the reasons you have mentioned?

A. Right, they are.

Q. Mr. Weber, if you don't mind my asking this of a more personal nature, what is your present hourly rate?

A. 6.3 to 7. Six dollars and——

Q. Would you know approximately how much you were paid in wages by Kaiser?

A. About $17,000.00, in that vicinity.

Q. Are you considered one of the more highly paid employees at the plant, or are you about the middle?

A. I guess I would be considered average. I have known some [24] to make less. I have known maintenance people

who got hired at Kaiser after me who make more than twice than I did.

Q. Has it been your observation, Mr. Weber, that most of the maintenance and craft people at Kaiser have been directly hired for work in such crafts after being qualified in those crafts outside the plant?

A. Right, they have been.

Q. Actually, there have been very few that have had the training in the plant, or while Kaiser employees?

A. Yes, that's right.

Q. Is that the explanation of what you said a while ago, that a lot of the craft people making more than you have actually been hired since you, they're junior to you in seniority?

A. Some of them are making more, yes.

Q. Mr. Weber, you described your protest of the quota system that was followed on the bids in 1974. Is it your understanding that this was what was required by the labor agreement, or was this something done by the company on its own, or arbitrarily?

A. This is something done in accordance with the 1974 labor agreement.

Q. I just want to be sure we were squared away. You're not saying that the agreement wasn't followed, but the [25] fact that the agreement was followed is the basis for your complaint?

A. Yes, sir.

Mr. Middleton: I have no further questions.

By Mr. Falkenberry:

Q. Mr. Weber, let me question you about your direct testimony to the effect that racial attitudes are affected in productivity. I understand that to be your testimony?

A. Yes.

Q. Now, you have only been chairman of the grievance committee for about three weeks, isn't that right?

A. That's right.

Q. You were a member of the committee prior to that time?

A. I have been, yes.

Q. And as a member of the committee, you work only in your department, or in your area of the plant, you don't cover the entire bargain unit until you get to be chairman, did you?

A. As chairman of the grievance committee, I covered the entire bargain unit. However, as an officer of the union and as a trustee and as a member of the negotiating committee in 1974, I did talk with people around the whole plant.

Q. You were a member of the local Union negotiating committee [26] in 1974?

A. I was.

Q. Did you raise any objection to the quota system during negotiations in 1974?

A. The 1974 negotiations, which I was a member of that committee, were held locally. It did not include this section. This was done in New York, which I was not a member.

Q. You mean, you just negotiated the local supplement?

A. Yes.

Q. Which is not the master agreement that is the exhibit here?

A. Yes, sir.

Q. Those are the particular rules that relate only to the Gramercy works?

A. Right.

Q. You did not participate in the negotiation of the master agreement?

A. I did not.

Q. Now, back to your testimony about attitudes, is that a "No. 1" lapel pin that you have got on your coat this morning?

A. It is.

Q. Would you tell the Judge what that is and what that represents, please, sir?

[27] A. The company has initiated a program for safety, to make Kaiser number one, Kaiser Gramercy number one, and it's a reminder that one man can make a difference to get one million man hours of safe work.

Q. Kaiser gives those buttons to the employees, is that correct?

A. I don't know that many employees have these buttons, but some of us do.

Q. It's a promotional sort of thing, to promote Kaiser?

A. Promote the safety program at Kaiser.

Q. Also, it represents the suggestion that Kaiser wants to be number one in the entire aluminum industry, isn't that correct?

A. I guess that's it. The wants of Kaiser, that's not the reason I have the "No. 1" button on.

Q. Now, you told Mr. Middleton that you never applied for on-the-job training programs prior to April 1974, is that correct?

A. That's right.

Q. And just so I'll understand, tell me why you did not bid for such a program?

A. Previous to 1974, the requirements of the company were that a person must have five years of heavy industrial experience, or at some time, a combination of three years of industrial experience, or some training, [28] which I had none of.

Q. And that experience requirement was removed prior to the posting of the 1974 bids?

A. Correct.

Q. Now, assuming, Mr. Weber, that you were completely satisfied with what the contract said and that the April 1974 bids had been filled by seniority only, by straight seniority, you would not have been the successful bidder for any of the training programs for which you bid, would you?

A. I don't know that. I was a bidder, and people with less seniority than me were awarded the jobs. Now, when

a man bids on the job, and the company comes to the people according to seniority, normally, and asks them if they want the job or not, they have the right to turn it down, which some of the men did, and a couple of people could have turned it down and it could have got to me.

Q. Assuming enough people had turned it down, it would have gotten to you, but if it had gone on straight seniority, it would have gone through a great number of people declining the job?

A. I would say a great number, 15 to 20.

Q. Have you seen the bid roster that's an exhibit in this case?

[29] A. No, I haven't.

Q. Mr. Weber, there have been no black craftsmen, to speak of, until very recently at the Gramercy works, isn't that correct?

A. No, I don't believe that's correct, because the carpenter craft, there has been for some years.

Q. There have been some black carpenters. About how many general repairmen would you estimate there are at the Gramercy works?

A. I would say in the vicinity of 180.

Q. Even given the training program and the filling of the April '74 bids, that there are very few blacks?

A. About four, I think.

Q. And that's also true with some of the other crafts, is it not?

A. Correct.

Q. Since you came to work for Kaiser—when was it, back in '68?

A. Right.

Q. Was there always some sort of training program available?

A. Yeah, there was a training program available.

Q. Has it grown since then, or are there more training opportunities available since, say, April of '74, than there were prior to that time?

A. Yes, there are.

[30] Q. Do you know of any blacks who were afforded on-the-job training opportunities by Kaiser until the last few years?

A. Not off-hand, but in the carpenter classification, there were some blacks working there and a lot of those people in that classification were trained on the job. However, I can't say for sure that any blacks were trained on the job, no.

Q. Most of the people you know about who were trained on the job prior to the last few years were white employees, weren't they?

A. There were very few trained on the job, but those were white.

Q. But the ones who were trained were, by and large, white, would that be correct?

A. Yes, because they had the experience to get to the training program.

Q. One other thing, Mr. Weber. I don't want to leave a misconception in the record. You described for the Court the contractual procedure as to how you bid for transfer opportunities. You said you bid by plant seniority?

A. Right.

Q. Now, we both know that's true, but there is also departmental seniority?

[31] A. There is departmental seniority, but not for transfer.

Q. Transfer is performed, under the contract, based on a competing employee's relative employment date, or plant seniority?

A. That's right.

Q. But once they successfully transfer, they receive a new seniority date, which is the date of their transfer into their new department, isn't that correct?

A. They keep the old seniority—plant seniority date, but also, they receive a——

Q. They keep their plant date for some purposes, but they pick up a new departmental date for promotion?

A. That's right.

Q. And that's for all purposes, other than transfer or layoff?

A. For reduction within the department, yeah.

Q. So, an employee transferring uses his plant seniority, really, only to get to where he's going, and once he gets there, he uses a new departmental date and he becomes a junior man on the date of his transfer into the new department, doesn't he?

A. Right.

Mr. Falkenberry: That's all.

The Court: Mr. Weber, I would just like to clarify a couple of points. You indicated that during 1974, [32] there were three jobs which were available for bids. One was general repairman, one was insulator trainee——

The Witness: The three that come up in April were general repairman, instrument repairman.

The Court: You didn't say insulator?

The Witness: Later on, in October, that barred whites from bidding.

The Court: The only two that you bid were general repairman and insulator trainee?

The Witness: No, sir, the jobs that I bid on in April were all three, general repairman, instrument repairman, and electrician, and I was barred from bidding on the insulator trainee job.

The Court: All right. So, your testimony is, then, that in April of 1974, you bid on instrument repairman, general repairman, and electrician?

The Witness: Yes, sir.

The Court: And that you were rejected from all three of those?

The Witness: Just only the general repairman, had I enough seniority to obtain it. I was by-passed in that job.

The Court: I see. In other words, with regards to instrument repairman and electrician, you would not [33] have had enough seniority to obtain those, whether you were by-passed or not?

The Witness: That's right.

The Court: Do you know of your own knowledge whether other members of the class—are you familiar with the class in this case?

The Witness: Yes, Your Honor. Other members of the class were by-passed for ali these jobs.

The Court: In other words, let me make sure you understand that, so that the record may be complete, and that is, all persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works, who are members of the United Steelworkers of America AFL-CIO, who were not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1st, 1974. So, to your knowledge, then, you're telling me that other members of that class applied for the instrument repairman and the electrician job and were rejected?

The Witness: Yes, Your Honor.

The Court: Because of their race, in your opinion?

The Witness: That's right, yes, and the October bid for the insulator trainee, all members of the class were barred from bidding, were discriminated against [34] because of their race.

The Court: All right. Now, sir you have indicated that you are familiar with the attitudes of the other employees because of your participation on the grievance committee and the Union activities and as, presently, chairman of the grievance committee, and you have testified concerning the attitude of white employees. Do you have any opinion or knowledge of the attitudes of minority group employees?

The Witness: Well, the attitude of the white employees toward the black employees, because of this program, I feel, have caused a bad reaction. It worsened the racial relations between the white and the black. The black employees of the plant know that the white employees feel that they're being discriminated against because of their race, and I'm sure that the black employees' attitude toward the whites is not as good because of the fact that the white employees attitude toward the black——

The Court: Can you give me any specific instances of friction, or incidents that might have occurred, on which you base that opinion as to the white attitudes or the black attitudes or both?

The Witness: Well, there have been a couple of words pass that didn't get out of hand, that was solved [35] right away. There was at least once instance that a black and white employee got in an argument, where a knife was present. I don't know that it was particularly because of the training program, but it did occur since the training program went into effect. Like I say, a lot of the racial problems that could have occurred, didn't occur, because of the fact that most everybody knows that I'm challenging this through the court.

The Court: Gentlemen, maybe you can simplify it. Do some of the documents in evidence indicate the total percentages of minority group employees and non-minority group employees of the plant?

Mr. Fontham: Your Honor, I think we have stipulated the minority make-up in the crafts. We have stipulated who was accepted and who had more seniority and who had less. I'm not sure that we stipulated the overall percentage make-up, but I believe, Your Honor, that the evidence will establish that it's just under 15 percent minority, plant wide, and that since 1969, the overall hiring has been on almost a 50/50 basis at the gate. Previous to 1969, the plant make-up was 10 or 11 percent minority, something like that. Is that an accurate statement?

Mr. Middleton: That's substantially correct.

[36] The Court: You have heard what your counsel has said?

The Witness: Yes, Your Honor.

The Court: And what's been agreed to by Mr. Middleton. Would you agree with those percentages?

The Witness: Yes, I would. Correct.

The Court: Now, when you had based your opinions concerning attitudes, are they based on the overall employees in the plant, or on employees in the crafts?

The Witness: No. It's based on the overall attitude of the entire plant.

The Court: I presume, based on what you have said, and you have given as reasons, that once the white employees are in the crafts, they would have no particular reason to be concerned about this program, this quota program?

The Witness: Well, there is some resentment, I guess, within the crafts, that they are training people who are not following the traditional seniority way of filling the job.

The Court: But their personal security is not being affected?

The Witness: Not as of yet, no.

The Court: They shouldn't be losing any incentive to do a good job, as you have indicated you have done, for example, because I think you testified that one [37] incentive to produce, to do a good job, was lessened because he didn't feel he would be promoted on merit, but, rather, on race. What I'm trying to find out is whether the same would apply to people who are already in the craft, and, therefore, not likely to be discriminated against?

The Witness: Well, although they do possess this security you talk about, I think they do still feel some resentment toward the company because of the fact that always at Gramercy, we have never had a discriminatory policy, racial discrimination. This is something that's being initiated, and we don't know what the future holds in store. If this can be done, which wasn't dreamed of a couple of years ago, then maybe the security of these workers would be in jeopardy in the next couple of years, should a layoff occur.

The Court: Has this resentment been solely to the company, or to the Union as well?

The Witness: Toward the Union, yes.

The Court: Those are all the questions I have.

If I have suggested questions that counsel who have already cross-examined wish to pursue, you may do so.

By Mr. Fontham:

[38] Q. Mr. Weber, these prior training programs that involved just a few people being trained by Kaiser prior to 1974, all of those training programs had as a prerequisite an experience requirement in that job area?

A. That's right.

Q. Now, not only did most black employees not have that experience requirement, you didn't have it either, did you?

A. That's right, and a lot of my fellow workers. They were, thus, not able to go into that training program, at that time.

Mr. Fontham: Thank you very much.

By Mr. Middleton:

Q. I think all our questions are being directed to that same general point.

Mr. Weber, let me clarify one thing. Under the new program, you and many, many others like you were able to bid on on-the-job training, whereas, under all prior programs, you had been unable to, is that not correct.

A. That's correct.

Q. So, under this new program that came in with a quota attached, you now have opportunities you didn't have under any previous job training program, is that not [39] correct?

A. That's correct.

Q. Both on the past training programs and the present, is there any selectivity on the basis of merit or past record?

A. On the past training program prior to 1974?

Q. Yes, other than experience, excuse me, in the craft?

A. No. It was done completely by seniority after that.

Q. You didn't mean to imply that prior to the present program, a man who had worked hard and showed initiative could be selected for a craft program, as compared with another employee who had not shown sufficient initiative and interest in the company?

A. No, prior to this 1974 program, the employee would have been selected, if he had the experience, only by seniority.

Q. And under the new program, as I understand it, the experience qualification has been done away with; all you

need is the interest in bidding on the job and to have the seniority, subject, of course, to the 50 percent quota, is that right?

A. That's right.

Q. How hard a guy may work or how good a record he has doesn't have anything to do with it, now, or in the past, either, does it?

[40] A. No.

Q. And promotion, then, into this kind of job is not dependent upon how hard a man works or not?

A. No.

Mr. Middleton: Thank you, sir.

By Mr. Falkenberry:

Q. Mr. Weber, you told the Judge about some animosity on behalf of various employees toward the Union, as well as to the company. Let me ask you, Mr. Weber, whether you have heard about what is called the Steel Decree, the Consent Steel Decree, in the steel industry?

A. I have heard about it very, very lightly. I didn't go into it, because we were tied up with our own.

Q. Have you made any attempts, as an officer of your local Union, to ascertain what the attitude and what the official position of your International Union is regarding seniority modifications and equal employment opportunities?

A. Well, first off, I think I know the official attitude, since the contract was signed by the International Union.

Q. I don't mean just in your industry, I mean the general policy of the International towards equal employment opportunity?

[41] A. I know it to some extent.

Q. Would you agree with me that it is a policy of the United Steelworkers of America to end all prior discrimination in employment, or the present effects of any prior discrimination?

A. I believe I can agree with that.

Q. Would you say, from what you know about the Steel Decree, that that was the policy that was behind the Consent Decree in the steel industry, was to correct prior inequities?

A. I think that was the objective.

Q. Is it also your understanding that with respect to the Kaiser contract, that paragraph 4 in the attachment to the master agreement is designed toward that end, also, as a remedial goal?

A. Well, partly. It's not by any means doing away with discrimination. It's starting discrimination. However, I guess to some extent, the company might think it would be.

Q. You have friends who work at other plants in the general New Orleans-Gramercy-Baton Rough area?

A. Some.

Q. Do you know anybody who works at the Crown Zellerback Paper Company?

A. No, I don't.

[42] Q. Do you know they have had a decree up there for a long time that modified their seniority?

A. I don't know much about Crown Zellerback. I have heard about it.

Q. Do you know, personally, of any plants where there have been a court decree modifying seniority?

A. No, I can't think of any that I'm familiar with.

Q. So, you couldn't tell me about, you know, the attitudes of friends of yours who work at plants where there were court decrees that changed seniority, you just wouldn't know about that?

A. I wouldn't.

Mr. Falkenberry: That's all, Your Honor, thank you.

The Court: Thank you, Mr. Weber. You may step down.

Mr. Fontham: Your Honor, Plaintiff calls Mr. F. H. Moran.

F. H. MORAN,

after being first duly sworn, was examined and testified as follows:

Examination

By Mr. Fontham:

[43] Q. State your name, please.
A. Fortune H. Moran.
Q. What is your address?
A. West Second, in Reserve.
Q. What is your age?
A. Forty-four.
Q. What is your occupation?
A. Plant service spare.
Q. Where are you employed?
A. At Kaiser, Gramercy.
Q. How long have you been employed at the Kaiser works at Gramercy?
A. It was 16 years on the 26th of March.
Q. Have you ever had occasion to apply for on-the-job training programs at Kaiser?
A. Yes.
Q. Tell the Court, please, what occurred with regard to these on-the-job training programs.
A. Well, in April of last year, they had three jobs that came up. There was general repairman, instrument repairman, and electrician, and I bid on all three of them. Then, I was passed, you know, on account of my race. I wasn't awarded any of the jobs.
Q. You had approximately 16 years' seniority?
A. Yes, sir.
[44] Q. Do you know what the approximate seniority of the black employees who were selected in preference to you was?

A. I wouldn't be sure, but it's either five or four years, that I think.
Q. Have you had occasion to apply or to be interested in any other training programs since then?
A. Well, in October of last year, insulator training came up and it was for colored only. It was on a bid for colored only.
Q. Would you have wanted to apply for that one if you had had the opportunity?
A. Yes, sir.
Q. Why did you bid for the on-the-job training programs?
A. Well, you have a lot more security in that job. You have a lot more overtime, and most of their work is days. Well, when you complete the training program, you have a little better insurance and vacations, and the pay would be better when you complete the training programs, and sick leave and all this, and like when you complete it, it would help your retirement, too, because the job pay would be higher, financially.
Q. To your knowledge, Mr. Moran, have separate black-white seniority lines, prior to this, ever been maintained at the Gramercy plant?
[45] A. Not to my knowledge.
Q. To your knowledge, have blacks ever been discriminated against at the Gramercy plant?
A. Not to my knowledge, no.
Q. Just to let me make sure I understand, with regard to the April 1974 bids, do I understand that blacks with less seniority than you were selected in all three training programs?
A. You're saying after the April bids?
Q. In April of '74, you applied for three training programs?
A. Yes, sir.
Q. In all three of those, were blacks with less seniority than you selected?

A. As far as I know.

Mr. Fontham: Thank you very much.

Your Honor, we have no further questions, at this time.

By Mr. Middleton:

Q. Mr. Moran, have you ever had an opportunity to consider applying for any previous on-the-job training programs at Kaiser?

A. I think previously I had bid on some training programs, but you had to have some experience, and I had bid on them, but I never did receive them.

Q. You weren't considered as qualified, due to the lack of [46] experience in those particular trades?

A. Yes, sir.

Q. Was the 1974 program, on which you bid and about which you have testified, the first on-the-job training program that you had had an opportunity to bid on that did not require advanced qualification in the way of experience or training?

A. I think so, yes.

Q. So, you had, in 1974, an opportunity to be eligible and bid on something that you never been eligible to bid on before?

A. Yes, sir.

Q. And that's true of a lot of fellows at the plant, the white fellows that bid, is it not?

A. Yes.

Q. In fact, there was a huge number of bidders on each of these jobs, were there not?

A. I'm not sure how many they had. I just know I bid on it.

They had some under me that bid on it, too.

Q. The point I make, this '74 program gave you and a bunch of other people an opportunity you had not previously had?

A. Yes, sir.

Q. Your complaint is not that a program is put in, but, rather, blacks junior to you ended up with the job?

[47] A. Yes, sir.

Q. You don't know, to your knowledge, whether you would have gotten any of these had they been handled on a pure seniority basis?

A. I don't know. I never was told whether I would have gotten one or not.

Mr. Middleton: Thank you very much.

By Mr. Falkenberry:

Q. Mr. Moran, you said that blacks had not been discriminated against at the Gramercy works. Would you tell me, please, sir, what the basis for you making that statement is?

A. Well, I think that they, you know, bid on everything else before, and they gotten all the rest of the jobs before, that I know of.

Q. Prior to this time, had any blacks gotten general repairman jobs?

A. Not by the training program.

Q. There weren't any black craftsmen, either, were there, general repairman hired from the street?

A. I think they may have one now, but how long he started—

Q. You may have one now, and if so, that would be one, plus the trainees, out of some 180, according to Mr. Weber, would that be correct?

A. I guess so.

[48] Q. It is a fact, isn't it, Mr. Moran, that there are some jobs at the Gramercy works that have never been held by black employees?

A. Until how long ago, you mean?

Q. Until the training program.

A. I would say yeah.

Q. There are still jobs, now, that have not been filled by black employees, is that correct?

A. Yes, sir.

Q. So, when you say that blacks have not been discriminated against, would it be fair to say that that's your feeling about it, rather than being any factual statement?

A. Well, it would be my feeling to what I know. You know, I don't really know it for sure, you know.

Mr. Falkenberry: Thank you, sir.

Mr. Fontham: I have no questions, Your Honor.

The Court: Thank you, sir. You may step down.

(Witness excused.)

Mr. Fontham: Your Honor, that and the stipulations completes the Plaintiff's case, although I understand there are certain witnesses that are going to be called by the Defendant.

The Court: Let's take a recess, gentlemen, now, for 15 minutes.

[49] (Recess.)

The Court: Be seated.

Plaintiff having rested, are there any motions to be made at this time?

Mr. Falkenberry: Yes, Your Honor. The Defendant, United Steelworkers, would, at this time, offer a motion for involuntary dismissal.

The Court: Let the record reflect that I have been handed a written motion for involuntary dismissal, requesting such relief on the ground, based on the facts and law, that Plaintiffs have shown no right to relief. The Court will reserve judgment on the motion and Order it be filed in the record.

Do the Defendants wish to proceed?

Mr. Middleton: Yes, sir.

Call Mr. English.

DENNIS E. ENGLISH,

after being first duly sworn, was examined and testified as follows:

Examination

By Mr. Middleton:

[50] Q. Your name is Dennis E. English?

A. Yes, sir.

Q. And where are you employed, Mr. English?

A. Kaiser Aluminum & Chemical Company, in Gramercy.

Q. Where do you live?

A. Baton Rouge, 12252 Brookshire Avenue.

Q. How long have you been employed by Kaiser Aluminum?

A. Just over eight years.

Q. How long have you been officially connected with the Gramercy plant?

A. Close to three and a half years.

Q. What is your present position there?

A. I'm the industrial relations superintendent.

Q. Your job as industrial relations superintendent, is it involved with supervision of all employee and personnel matters at the Gramercy plant?

A. Yes, it does. My department has the responsibility for labor relations, which concerns, basically, union matters, personnel relations, safety, security, medical, all the employee-related functions.

Q. Could you state, please, sir, what, in general, is the percentage of minority employees in the plant population?

A. As of December of '74, 14.8 percent of the hourly workers, the bargaining unit, were minority.

[51] Q. How does that compare with the general population in the vicinity of the plant, in the Parrish of St. John's and St. James?

A. By the figures that we get from the Department of Employment Security, the two parrishes, St. James and St. John's, on which our plant kind of splits that parrish line, there are about 46 percent minority and 54 percent white.

Q. You are, I assume, acquainted with the 1974 labor agreement and, particularly, that portion of it that deals with on-the-job training and includes a one-for-one ratio of minority and women to white males?

A. I'm quite familiar. It's a 50/50 program.

Q. Now, was any particular objective or target data included within the 1974 labor agreement or its subsidiary, Memorandum of Understanding, adopted for Gramercy?

A. Yeah. What that agreement tries to do, at Gramercy, and we're one of many plants, we have found, once again using the available statistics, that there are about 39 percent minority employees in the available work force in the two parrishes around us. As a result of that, we, in line with that agreement, are striving to obtain, at some future date, a 39 percent minority population in each of the craft families, as is spelled out in that agreement.

[52] Q. The percentage of blacks in the available work force, then, was adopted as the objective, or the goal or standard, for this new training program at Gramercy, is that right?

A. Yes.

Q. Mr. English, was this new program under the '74 agreement restricted just to Kaiser, Gramercy?

A. No. That program was agreed to by Kaiser Aluminum & Chemical Corporation and the United Steelworkers, which represent some 15 plants under the master agreement that is negotiated about three years on a national basis.

Q. Is there any difference in the application of this new program, as between various Kaiser plants, to your knowledge?

A. The application of the program should be similar, because the agreement affects us all. However, Gramercy is different from the other plants, in that, because we are from a different geographical region, we have a different minority work force availability, and I think, as the memorandum will show, Gramercy is in an area which has the highest minority work force available, that being the 39 percent figure.

Q. I gather that in some of the other plants, the objective percentage that the program seeks to achieve is [53] something less than 39 percent?

A. I think it's all over the map. Some plants, as little as one or two percent, based upon their location in the country.

Q. Now, in addition to the Kaiser master agreement that, I believe you said covered some 15 different Kaiser plants, do you know of your own knowledge whether this same program for skilled craft training on a minority ratio basis is followed anywhere else in the aluminum industry?

A. To my knowledge, the other big aluminum companies in the aluminum industry, Reynolds, etcetera, have the same agreement, so that it is an industry-wide agreement versus just a Kaiser agreement, or a Gramercy, Louisiana, agreement.

Q. You're saying, then, that the particular program under attack here, that is, the bidding for on-the-job training into crafts without previous experience on the basis of seniority, but on a one-for-one ratio, is an industry-wide procedure?

A. Yes, sir.

Q. Does the same union, the United Steelworkers, represent all of the particular plants and industry-wide employee coverage that you're speaking of?

A. I think the Steelworkers represent plants in each of

[54] those companies, Kaiser, Alcoa and Reynolds. Other unions, I think, represent some of the employees.

Q. Mr. English, in your experience at Gramercy, what did you find had been the relative make-up of the skilled crafts in maintenance, so far as their racial composition?

A. Prior to our '74 agreement, which has now added seven more blacks to the craft classification, prior to that agreement, we had about a two to two and a half percent minority craft percentage in the total craft area. We had a total of five.

Q. You had a total of five, you were saying?

A. Prior to this program, we had a total of five minority employees in all of our crafts, combined.

Q. That's five out of approximately how many, total?

A. I think it's somewhere around 290, at that time.

Q. Do you know why there was this small percentage of blacks within these craft groups?

A. I think, basically, it's because of the unavailability of trained, educated and qualified minorities. I know that Kaiser, Gramercy is not the only company in Baton Rouge or up and down the river that is facing the same dilemma of trying to get minorities into their work force, into the specialized craft jobs, especially.

[55] Q. Have any particular efforts been made by you, or to your knowledge, to secure any minority employees in craft categories?

A. We have done several things. For the past several years, because of what Kaiser as a company wants to do, because of what we have agreed to with the Union, and because of annual compliance reviews with the Government, we have set goals, timetables, to try to achieve a larger percentage of minorities in the crafts. We have advertised in Baton Rouge and New Orleans newspapers. We advertise in minority-only newspapers when craft vacancies become available. We keep separate craft application files, so that any time the craft vacancies comes up, our first thing, we will go to that craft file and we will try to locate qualified

black craftsmen, and we always look for the blacks before the whites, and it's quite difficult, because they aren't available.

Q. Why, then, after such a program, did you have only five or six blacks in the maintenance and skilled crafts, prior to the institution of the '74 agreement?

A. Once again, we can advertise all we want, and we can keep all the files we want, and look as hard as we can look, and they just aren't available.

Q. What do you mean by "not available"? They're all working [56] somewhere else?

A. There are very few that are trained and qualified, to begin with, and any black minority today who is qualified is working, because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll.

Q. Do you know, from your own investigations into the general subject matter, why it is that there are no blacks trained and qualified, relatively speaking, in this area?

A. I can guess.

Q. No, don't guess.

You have looked into it, I assume, as part of your professional responsibilities. What do you find is the reason?

A. Most of the training for craftsmen over the years has come through the building trades. They have apprenticeship programs, whereby a candidate spends four or five years in an apprenticeship program, and he graduates as a skilled craftsman. Until just recently, blacks did not get into those building trades programs. I think that the blacks that are qualified, those that are qualified and hold jobs today, somehow got experience on their own and they went to some trade schools and got some kind of [57] education to allow them to get into the crafts.

Q. Did the nonavailability of trained blacks from the labor force, in general, have anything to do with the institution of the 1974 program for on-the-job training?

A. Well, I think it had everything to do with it. Kaiser and the Steelworkers realized that we were all receiving more and more pressure to local blacks for our craft classifications. Gramercy, Louisiana, didn't have blacks in the crafts, nor did the other 14 Kaiser-Steelworkers locations, nor did Alcoa, nor did Reynolds. I think, at that time, the officials of both Kaiser and the Steelworkers realized that something other than the ordinary, look until you find them, had to be done to get blacks into the crafts. It was a company-wide problem, and I think it was an industry-wide problem.

Q. Prior to the institution of the new program under the 1974 agreement, had there been any previous training programs that, to any extent, furnished an input of trained manpower into the crafts?

A. We had two programs that expand several years for two separate crafts. We have the craft that's been discussed, called general repairman. We have the craft, carpenter-painter. It's a combined classification. [58] There have been training programs in those two crafts.

In the carpenter-painter in 1964, through 1971, and general repairman since 1968, and then again in 1971, both of those programs, as described, required experience plus seniority for an employee to get into that program.

Q. By experience, you don't mean that he was already a qualified journeyman in these particular crafts before he could go into the training program?

A. No. In the carpenter-painter training program, we had required one year of previous experience or schooling, to the effect of one year of experience, so that it wouldn't be the effort of having to go to train an employee from scratch. We wanted some experience, realizing he didn't have it all. There was an agreement negotiated with the Union, because they wanted the craft positions given to their employees first, before we hired from the outside. So, we agreed that if an employee had some previous experience, we would train him for the balance, and then he was

paid less during his years of training, and as each six month or one year period passed in training, his wage rate would increase to some cents per hour.

Q. Were you able to fill your needs for new craft qualified [59] journeymen by such training programs as you had previously?

A. No, because we had continued, and we have continued, to hire off the street, directly from the outside, all during that period of time. I think since '64, we had 11 carpenter-painter trainees, and we had 17 general repairman trainees, from '68 through '72.

Q. Now, how does that compare with the number hired as journeymen in those categories through the front gate, if you will, or through outside sources?

A. In 1974, specifically, we hired 22 craftsmen. I think we hired 17 general repairmen, one machinist, a couple of electricians, and a number of instrument repairmen, as a general statement.

Q. Now, these new people you were able to hire off the street, that you just mentioned, were any of those blacks, incidentally?

A. One was a minority general repairman, who is the first and the only general repairman in the plant who was prior to the training program. Still, he's the only fully qualified journeyman.

Q. In the general repairman category?

A. Yes. The other 21 that we hired were all white.

Q. In selecting and hiring those people, was any effort made to seek and employ more of a higher percentage of [60] qualified blacks?

A. In each case, we advertised, we went to a minority file, we interviewed anybody who showed interest. There just isn't the availability, again, and we only hired the one general repairman.

Q. Mr. English, it is fair to say, then, that the present program instituted by the Steelworkers and the various aluminum companies, including Kaiser, was instituted as

the only known means of obtaining trained black craftsmen?

A. Well, that is the means that we selected, because we knew that something out of the ordinary had to be done.

Q. Do you know of any other means available, that you have considered, or that the companies considered, or that the Steelworkers, the Union, has considered?

A. No, I don't.

Q. Now, as part of that program, have you also opened the way for white employees who desire to go into craft training to do so, that were not previously eligible?

A. In the respect that there is no longer an experience requirement, as was discussed earlier by the previous speakers here. You had to have experience to be considered and to get into the program, and that [61] meant black and white, both. Under this current program, it's primarily a strict seniority only program. We do consider physical disability, and there was one bidder on these programs, who did not have the normal physical abilities and, therefore, he was denied entry into the program. There was one employee, also, who had seniority, who could have got into the program, a white male, who was denied entry because he had been disqualified under one of the previous programs.

Q. You mean, unsuccessfully attempted to take a previous training program?

A. Yeah. For the most part, it is seniority.

Q. Now, what's the total number of people that have entered upon training programs under the new agreements and procedures?

A. Thirteen.

Q. And of those, what is the racial composition?

A. There are seven minorities and six whites.

Q. Now, incidentally, the agreement deals, also, with females. Do you have any females in the hourly work force at the plant?

A. We have begun to hire females. We have four females in the hourly work force now.

Q. Do you have any in the craft jobs, or has anybody applied [62] for any of them?

A. Two of the females were in the plant when the first bids went on the board in April, and they did not sign the bid.

Q. Is there a separate female quota or goal?

A. There is a separate female quota in the Memorandum of Understanding, which is a part of the contract, which stipulates that five percent of the 50 percent minority is the goal that we would like to attain for female employment in the crafts.

Q. Is this new program any different from previous programs, so far as its methodology, or the usefulness of the trainees to the company during the course of their training?

A. Yeah, it's quite a bit different. When the employee comes to us now, in a training program, he, for the most part, has no training or experience or background whatsoever in mechanical or electrical ability, or whatever the training program is. For that reason, the training program, based upon the individual craft, will last either two and a half or three and a half years, that is, on-the-job training out in the field. At the same time, he gets about four hours of schooling per week by a training supervisor who oversees the training program, and at [63] the same time, he's required to take and pass International Correspondence School home studies, home courses, and these courses, in each of the programs, range, I think, from as low as 40 courses in the air condition repairman training program, to something like 66 courses in the electrical program. So, we have a combination of on-the-job training, classroom instruction, and home study.

Q. Has this program been evaluated in terms of what it may be expected to cost the company per trainee?

A. Yeah, we put a figure on that. We feel that on an

annual basis, the minimum cost is between 15 and $20,000.00 per trainee.

Q. Are you able, at this time, to have an unlimited number of trainees in any particular specialty, such that all future needs for journeymen in these crafts can be met by the present training program?

A. What we attempt to do is forecast the positive needs that we think we're going to have. We attempt to look at turnover rates, how many people will retire the next year and the year after, and the quit ratio, the death ratio, so we attempt to forecast those needs that we think we're going to have for certain. Based upon that forecast, we will then select that number of employees to be trained, knowing, of [64] course, that there has got to be an upward number of trainees that you can be training at once, because the trainees don't have the experience to get the job in the field. So, we still have to have the qualified journeymen in the field to do the work during the two or three years that he's being trained.

Q. Is there a limited ratio, you might say, of trainees to journeymen, in any one particular category, that can be considered feasible, either for operations or for training purposes, as were any one time?

A. I'm sure there is. We haven't set a limit. We haven't discussed that limit. I don't think, personally, that we're going to be looking at a group of trainees, at any time in the near future, of more than 20 trainees at once. We don't have any trainees for 1975.

Q. On the basis of your studies and projections, over the planned course of this new program, if it continues, would the objective goals, percentages, be reached very soon, in a matter of two or three years?

A. No, I think projecting out at what point we'll meet that percentage we're trying to attain, I'm guessing it could probably be a minimum of ten years, to a maximum of maybe never, depending upon our needs and our [65] turnover, and all the things I mentioned earlier.

Q. This is not, then, a drastic, sudden thing that can be all accomplished within a matter of a very few years under the 1974 agreement, to bring about a quick change in the percentages?

A. No, it's not. I think it's simply a method of trying to get started and get a program going to where we can place the minorities in the craft programs.

Mr. Middleton: I believe that's all the questions I have, at this time.

Mr. Falkenberry: If Your Honor please, I'm not sure what the Court's wishes are. I assumed I would go next.

The Court: I think it would be more orderly.

Mr. Falkenberry: I have just a few questions.

The Court: All right.

By Mr. Falkenberry:

Q. Mr. English, let me take Mr. Middleton's last question to you one step further and ask you what will happen under the master agreement, once the minority goal is reached in a particular craft family?

A. Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains [66] at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea, again, being to have a minority representation in the plant that is equal to that representation in the community work force population.

Q. Now, the original on-the-job training programs that Kaiser operated, as I understand your testimony, were begun for persons who had some prior industrial experience, is that correct?

A. Right.

Q. And seniority, in addition to experience, was the standard for selection for those O.J.T. programs?

A. Right.

Q. Did that training program result in blacks receiving training, or being selected for training programs?

A. In the carpenter-painter classification, of the 11 trainees over the 1964 to 1971 period, there were two minorities, two blacks, who got into that program.

Q. And the other training program was for general repairman?

A. There were no blacks that ever got into that program.

Q. All right. In fact, the first blacks got into the general repairman program in 1974?

A. That's right.

[67] Q. One from the gate and three through the on-the-job training bids that we have been litigating about, is that right?

A. That's right.

Q. Now, prior to the institution of the 50 percent minority requirement, the company dropped, did they not, the prior industrial experience requirement for entry into the training program?

A. Yes, we did. We used to require a five years' experience factor for hire into the journeyman top-paying, standard rate craftsman classification. We reduced that five year qualification to three years.

Q. All right. Did that result in an increase in black participation in training programs?

A. Well, that requirement was a requirement to be hired from outside the plant, not a training program requirement.

Q. Not a training program requirement?

A. This is just to be hired from outside as a skilled mechanic or whatever.

Q. All right. Has the company hired, other than in the carpenter-painter category, qualified black craftsmen from

the street, or have the blacks who are in craft jobs been selected through the training programs?

[68] A. We had, prior to 1974, five blacks in all of our crafts combined. Two of the carpenter-painters got there through the training program which I just mentioned. There were two other carpenter-painters who were hired off the street, qualified, and there was one garage mechanic who was hired off the street, qualified, and then in 1974, early in 1974, we hired a journeyman general repairman off the street.

Q. Is it true, incidentally, that most of the general repairmen who today work for Kaiser, Gramercy works, were hired off the street, and a much smaller percentage came through the training program?

A. Yeah, that's right. I think the figures show that, once again assuming a 180 members general repairman classification as of December, 17 of those came through the training program, which means that 163 came from off the street, hiring over the last 17 years.

Q. Is is correct that until 1974, the company was never able to hire a black general repairman from the street?

A. That's right.

Q. If the training program were to operate, Mr. English, as Mr. Weber suggests, that is, by using plant seniority alone, from your experience and your position at the [69] plant, can you tell the Court what the impact on black employees would be if the company and the Union simply followed plant seniority in selecting applicants for on-the-job training programs? Would there be any blacks in the program today?

A. There would be, I think, a couple. We do have some very senior black employees that were hired in and started the plant in 1957-58, but those black employees already had some pretty highly paid top jobs in the plant, and on the bids, on these six different program bids, there were some black bidders who had a lot of seniority, but for the most

part, there would be very few blacks that would get into any of the crafts for quite a while.

Mr. Falkenberry: No further questions.

By Mr. Fontham:

Q. Mr. English, with regard to the selection for on-the-job training, this seniority requirement that you have been talking about is a plant-wide requirement, plant-wide seniority, is that right?

A. That's correct.

Q. And this is seniority that applies to every laborer or employee as of the date that he's hired at the plant, is that right?

A. That's correct.

[70] Q. It's not affected by departmental seniority or job seniority, applying for on-the-job training programs?

A. No, it's not.

Q. And to your knowledge, no difference in the seniority of blacks and the seniority of whites has ever been in effect at the Gramercy plant, is that right?

A. If I understand what you're asking me, we have not had, and we don't have, a discriminatory system of seniority at the plant.

Q. Is that right?

Mr. Middleton: You have to answer out loud.

The Witness: I'm sorry.

By Mr. Fontham:

Q. Is that a correct statement?

A. That's correct. My answer was that we don't feel that we have had, or do have, a discriminatory system of seniority.

Q. With regard to the past training programs, other than the experience requirement, plant-wide seniority was the only other criterion, is that right?

A. Well, once again—

Q. Other than the physical—

A. Once again, physical limitations.

Q. But other than the physical limitations and the experience requirement, plant-wide seniority was the only [71] criterion?

A. That's right.

Q. And this was true for all of your training programs conducted at the plant?

A. Yes.

Q. Now, with respect to the new training programs that have been instituted in 1974, the Union has been asking for on-the-job training programs with no experience requirement for some time, is that correct?

A. The Union has negotiated, over the years, in an attempt to broaden the training programs in several respects, to get in the plant. They would always prefer that their people get first chance.

Q. This has been one of their goals in negotiating with you, to try to reduce the experience requirement, or to eliminate it completely, with regard to training programs?

A. Yes, it has.

Q. Also, with regard to the old training programs, Kaiser had virtually used up all the people in the plant with any experience in the crafts, is that right?

A. That is right.

Q. So, if Kaiser wanted to continue with training programs, it had to drop the experience requirement?

A. It either had to drop it to something less than the three [72] years, or go to nothing.

Q. Now, just so that we can expand the record with regard to my side of this case a little bit, with regard to the training programs that are now in effect, since February 1, 1974, all of these training programs are based on first, seniority, as a selection criterion, and the 50 percent racial requirement for minority employees; those are the two criterions, is that correct?

A. That's right. Once again, with the disability thing, physical limitations.

Q. In the selection of employees under these training programs, in order to meet the racial criteria, white applicants with greater seniority than the black applicants who were selected, were passed over, is that right?

A. That's right.

Q. One of these employees was Mr. Weber, in one of the training programs, is that right?

A. In the general repairman training program, there was a minority employee selected who had less seniority than Mr. Weber.

Q. On one occasion, with regard to the insulator training program, it was limited to black employees only, is that correct?

[73] A. That's correct.

Q. That was because there was an imbalance of one extra white in the training program, at the time, is that correct?

A. Yeah, I think so. Of course, the program was set up on a 50/50 basis, and the first three bids that were bid in April, general repairman, instrument repairman, and electrician, we had a total of nine trainee vacancies. We decided to go with five minority and four whites out of those nine. About a month later, in May, we bid for one more trainee in the air condition-mechanic classification. Keeping in line with the 50/50, we then stipulated that he would be a white only. So, it would be back on balance, 50/50. So, that was a white only vacancy. Then, in October of 1974, we expanded the training program to the carpenter-painter and insulator classifications. We took two carpenter-painters, one of each race, and once again, since the minority was the odd number, or the first of any two, we stipulated that the fifteenth trainee would, again, be black.

Q. In effect, you make a selection? When Kaiser makes a selection on these training programs, what happens is that you make, in effect, two separate lines of seniority, one is the white line of seniority, and [74] one is the black

line of seniority, and then you take the top people off each line, is that right?

A. In effect, you do that, because you skip the whites to get the blacks, if necessary.

Q. When the selection must be black to maintain the quota, you select a black applicant, no matter how many white employees have greater seniority, is that right?

A. That's right.

Q. So, you may select a black applicant with six or seven years' seniority, even though someone like Mr. Moran has been working at the plant 16 years, is that right?

A. That's correct.

Q. Now, the majority of the workers at the plant are white, is that right?

A. Well, 14.8 percent are minority. So, that makes the balance of them white.

Q. Thus, although the white workers are about 85 percent of the work force, they have to compete for only 50 percent of the openings in training programs, is that right?

A. That's correct.

Q. And black workers, comprising 15 percent of the work force, are allowed 50 percent of the training [75] programs, is that right?

A. That's correct.

Q. Now, with regard to the experience requirement that you're talking about for on-the-job training programs, this experience requirement was, really, something that you all required because it made it easier to put the job selectee right into plant work, as soon as he was hired, or as soon as he was taken into the program, is that correct?

A. Well, it required less training, to the point where he would then become a journeyman-tradesman.

Q. Now, you spoke of the figures that you received from the Louisiana Department of Employment Security with regard to what the black population of the St. James and St. John's parrishes is, and I believe you said that the

minority population in the work force is about 39 percent, is that right?

A. Correct, in those two parrishes.

Q. You did not intend to indicate, though, that the minority population of trained craftsmen is 39 percent, did you?

A. No, I did not.

Q. In fact, if your experience is any indication, the minority percentage of trained craftsmen in St. John's and St. James parrishes would be substantially [76] smaller than 39 percent, is that not right?

A. It sure would be.

Q. In fact, if your experience is an indication, it might be about the same as your percentage of trained craftsmen at your plant, is that correct?

A. It could very well be that low.

Q. If the affirmative action that you have taken with regard to trying to get trained craftsmen is any indication, you might even have a greater percentage than the percentage of minority craftsmen in St. James and St. John's parrishes, is that correct?

A. Well, I don't understand the greater percentage.

Q. Well, the people you have managed to get into your craftsmen positions at the plant, be it three or four percent of the total craftsmen at the plant, because of the fact that Kaiser has tried affirmative action to get these people, it may be that there are less than four percent minority craftsmen in the general population of craftsmen in those parrishes, is that not right?

A. It may very well be.

Q. Your experience would indicate that it is true that it might be as little as one or two percent minority craftsmen in St. James and St. John's parrishes?

A. I would agree with that.

[77] Q. Kaiser depends on Federal contracts to some substantial degree, is that right?

A. That's right.

Q. And Kaiser would like nothing better than to please the Federal government as much as it can on getting these minority people for the craftsmen positions, is that correct?

A. I think it's more than please. I think it's do it or else.

Q. In fact, when you talk about affirmative action, you're talking about real, honest-to-goodness efforts that you have made to try to find somebody to put in those jobs, is that right?

A. That's correct.

Q. So, when you talk about a statistical imbalance, you're talking about statistically imbalances that were caused outside of Kaiser and not by you, is that correct?

A. That is correct.

Q. Now, even though you have had these training programs existing from '64 to '71, most of your craftsmen were hired from outside the plant, is that correct?

A. That is right.

Q. And the reason why they were filled from craftsmen outside the plant was, primarily, because it's sometimes [78] to predict vacancies far enough in advance to train somebody?

A. Yeah, it is not possible to predict all vacancies.

Q. So, if you had vacancies occur, you didn't have a trainee, you pretty well had to hire somebody from outside the plant?

A. That's right.

Q. When you try to hire somebody from outside the plant, you advertise, primarily, in all-black newspapers?

A. Right.

Q. And you contacted, through this file, person-to-person, black applicants, is that right?

A. That's right.

Q. Kaiser has hired black employees at the Gramercy plant since its opening, is that right?

A. Yes, sir.

Q. There has never been any policy of not hiring blacks at the gate, is that right?

A. That is right. Kaiser, Gramercy is all I can speak for.

Q. I understand. But that plant opened in 1958, something like that?

A. '57 or '58.

Q. At that time, at least, there was no discrimination solely on the grounds of race and hiring practices, is that right?

[79] A. Yes, sir.

Q. And in response to any quota requirements, or the goal requirements of the Federal government, based on the minority work force, Kaiser has hired a greater percentage of black employees than the black employees comprise in the work force since 1969, is that right?

A. Since 1969, we have hired at the gate for production jobs, for non-craft jobs, just the kind of jobs that don't require any real experience, we have hired about 50 percent minority.

Q. And prior to that, it was what you viewed as the most qualified applicant, black or white?

A. Yeah.

Q. So, since then, you have been hiring 50 percent, which is greater than the 39 percent minority work force in the St. James, St. John's parrishes, is that correct?

A. Yes, sir.

Q. So, assuming that these training programs would go on and on, it may be that blacks entering the crafts will be delayed som what if it's only on the basis of seniority, but eventually, a large percentage of blacks are going to get a shot at bidding on those training programs, is that right?

[80] A. That's right. Once the group from '69 forward begins to make up a representative amount of employees in the plant and, so to speak, 50 percent, at that time, whenever that day is, there will be more blacks available to bid on a seniority basis, with equal or higher seniority.

Q. Just on the basis of who is employed at the plant with a certain amount of seniority, the black applicants are going to have a greater percentage than their percentage of

work force in the parrish, of those two parrishes, of shots at craft positions?

A. Well, let me explain. When we hire at the gate on a 50/50 basis, we're hiring non-skilled people. The 39 percent figure, of course, it's a work force availability in the entire area. Once again, when we reach that work force equality inside, as the community, we will then continue to hire the non-skilled people on that 39 percent figure, too, if that's the figure, at the time.

Q. Would you agree, Mr. English, that the 50 percent quota has caused discontent among the white workers at the plant?

A. I would agree that there has been discussion about it. I do not think, and I have not seen from my position, any racial problems in the plant. For the most part, [81] the Gramercy plant has always been a well-balanced, non-problem plant. One of our better, I would think, in the whole corporation. We have never had racial problems, racial tension, and I have not seen any increase in the tension since this program was put in.

Q. A couple of white employees, though, have either filed grievances, or filed with the Equal Employment Opportunity Commission, concerning this quota, is that correct?

A. Yes, they have.

Q. A number have expressed their discontent through the company procedures for filing grievances, is that right?

A. I think Mr. Weber's grievance is the only grievance that we have had filed on that particular issue. Of course, once again, realizing that he was, you know, filing a grievance on an issue which would be the same issue for anybody else.

Q. The training programs in the crafts are considered desirable by most of the workers at the plant, is that right?

A. Yes, they are.

Q. An applicant who graduates from a training program, in most instances, will be better off with respect to [82] pay and seniority, I mean, and job security, is that right?

A. I don't know if I fully agree with Mr. Weber on that position. We have had, in the training program to date, two employees who bid from Job Class 17 jobs, to the hope of getting a Job Class 19 job. However, by going from a shift type job to a straight day job, in the end, they're going to be making less money on the straight time basis. Now, the overtime monies are going to change that, so we were quite surprised, we had some of the more highly paid operating people bid the craft jobs. On the other hand, on the security aspect, once again, when you take a man out of a department who has significant department seniority, where he's protected in his department pretty well because he's high up, and he bids on a craft training program and is trained, he then becomes the most junior craftsman in that craft department, and any lay-off is then going to hit him first, as a craftsman, whereas, it may take quite a while, or there may have to be a pretty significant lay-off for him to be touched as a member of his previous department. So, the security thing, yeah, it could be, because that's going to depend upon the needs of the company. But if we [83] cut craftsmen, he's going to lose his job sooner, as a craftsman, whereas, we would have to cut fairly deep to reduce or lay off one of the more senior, higher paid operating employees.

Q. With regard to the blacks who are now being given what amounts to preferential treatment for selection of on-the-job training programs, these blacks were hired by Kaiser, rather than being refused to be hired?

A. That's right.

Q. If we assume for a second, and I realize there is no evidence of this, and that Kaiser denies this, but assume that at some point some black had been discriminated against in the past with regard to the hiring of a craftsman, that guy is long gone by this time, is that correct, because

he would have been hired from outside the plant, he would have been an applicant from outside the plant, is that right?

A. Yeah. Any black who had not been hired, obviously, would have, or may have, filed a charge that he was not hired, so the answer to your question is yes.

Q. So, to the extent that this purportedly is a remedial program, you're talking about generally remedial, rather than helping these particular guys, because [84] these particular guys have previously been discriminated against by Kaiser, is that right?

Mr. Falkenberry: If Your Honor please, I object to the relevance of that, and I believe counsel while he's entitled to cross-examine the witness and lead him, is not entitled to make characterizations about particular programs.

Mr. Fontham: Your Honor, I didn't characterize the program at all.

The Court: Objection overruled.

The Witness: Ask the question again, please.

By Mr. Fontham:

Q. Well, to the extent that Kaiser or the Union think that this is a remedial program, the remedy that's involved is a remedy applicable to the black race, rather than a remedy applicable to particular workers who are now being favored for previous discrimination, is that right?

A. Yeah. We do not think that we have discriminated inside our plant.

Q. So, these guys that are now being favored have not previously been discriminated against, to your knowledge?

A. They haven't, yes, that right.

Mr. Fontham: That's all I have.

[85] The Court: I would like to ask a few questions, which you all may wish to address yourselves to.

You have indicated, sir, that since 1969, Kaiser has hired from the gate a 50/50 black-white ratio. Can you tell me

what prompted that change in 1969? I think, to be complete, you have indicated that previously, you hired on the basis of what you considered the best qualified applicant, without regard to race. Then, beginning in 1969, you commenced hiring on a 50/50 ratio of black and white applicants, without necessary regard to the most qualified individual. Now, what prompted that change in 1969, if you know?

The Witness: That was prompted by a compliance review from the Office of Federal Contract Compliance, which is a division of the Atomic Energy Commission, who is the Federal government office that is responsible to make compliance reviews in this part of the country in the chemical industry, and following their visit to our plant in 1969, when they saw that they had a relatively low percentage of minorities in the work force, their recommendation to us was that we hire at a 50/50 clip until the time that the in-plant population equaled the general population in the community.

[86] The Court: You say their recommendation, was that a recommendation in the sense that was it mere advice, or would any consequences have flowed for failure to follow that recommendation, if you know?

The Witness: From my experience, a recommendation from them is pretty much telling us that we ought to do that if they are going to approve our affirmative action plan. If they don't approve our plan and we are held in violation of that, then they would present us with a show cause order and give us 30 days, I think, to show why we should not live up to what they have recommended, and in the end, we either then lose as an entire corporation, not just our Gramercy plant, but as an entire corporation, all Government contracts, or contracts with any other company that does business with the Government.

The Court: So, then it would be a requirement that you follow this recommendation in order to do business, for your company to do business with the Government?

The Witness: We just went through another compliance review last month. Recommendations they make, we follow.

The Court: Now, what, specifically, prompted the change in 1974, in the Union agreement, which brought about the change from seniority to race with regard to [87] bidding for training programs?

The Witness: Well, I think when the company and when the industry and when the Steelworkers, the Union, looked around and read the Court decisions being made. We looked at the settlement that had just been made with the steel industry and the steel companies. We looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to speak of. There was certainly no availability, because we had beat the bushes to death, and we had the Government pressure that we had, and we realized that if we did not do something on our own, then the Government was going to do it for us, and in one case that was mentioned earlier, the Crown Zellerback case, and the Baton Rouge Kaiser plant, the Government has come in to settle company-union affairs for us, and in every case, the Government's remedy—

The Court: What branch of the Government are you referring to?

The Witness: Well, the OFCC, the EEOC, the NAACP, the Legal Defense Fund, and in the case of Baton Rouge, every branch has been into that plant, and as I was saying, whatever their remedy is, believe me, it's [88] one heck of a lot worse than something we can work out ourselves.

The Court: Specifically, has the EEOC in any way pressured you or required that this action take place, and in referring to "this action," I'm referring to the 1974 change?

The Witness: I don't think I can answer that, because I was not a part of the actual agreement.

The Court: Please don't speculate.

The Witness: Okay, I can't answer that.

The Court: Can you tell me whether or not the action in making the change in 1974, in the Union contract, was a voluntary action by the company and the Union, or whether it was done as a result of the requirements which you have described, by various Governmental agencies? Again, if you don't know, don't speculate.

The Witness: Well, I think it was done voluntarily.

The Court: Because of the fear of consequences?

The Witness: Yes.

The Court: If it did not?

The Witness: Yes.

The Court: Do you know from your company's policy and the Union policy, whether it would have been done, in the absence of these requirements, on purely [89] what they considered to be benevolent social reasons, or any other reasons? If you don't know, please don't speculate.

The Witness: I'm guessing. I won't guess. I don't know.

The Court: That's all I have.

Mr. Middleton: I have no further questions.

Mr. Falkenberry: I have a few, Your Honor.

By Mr. Falkenberry:

Q. Now, Mr. English, Mr. Fontham asked you whether or not the Union had negotiated away the prior industrial experience requirement for entry into the training program, and I believe you said that they had, is that correct?

A. No, I think he asked me if they had attempted, over the years, through negotiations, to negotiate it away, and I said yes, they attempted to do so.

Q. Throughout the years, is it true that the Union's efforts were directed towards obtaining additional opportunities for their members, who were also Kaiser employees, as opposed to creating opportunities for people from the street?

A. That's right.

Q. Would it be fair to say that that is one of the considerations behind the fact that there is a training [90] program at Gramercy and at other Kaiser plants today, is the desire of the Union to have opportunities available for their members and Kaiser employees, rather than for new people.

A. That's right.

Q. Now, he also asked you whether or not it was a fact that whites had approximately 85 percent of the total hourly work force at Gramercy, and whether or not they had to compete for 50 percent of the training opportunities, while blacks made up only 15 percent or so, and they got 50 percent, do you recall that?

A. Yes, I do.

Q. Now, it's also true, is it not, that prior to the institution of the one-for-one ratio in the 1974 agreement, whites already had nearly 98 percent of the craft jobs?

A. Yes, they did. Whatever the figure was, they had the great majority.

Q. I think one of your exhibits, or maybe you testified, that prior to 1974, black representation in the crafts was something a little more than two percent?

A. You're right. That's right.

Q. It's Kaiser Exhibit 1, which you have seen, and after the training program, it was only 4.45 percent?

A. Yeah. I think it was about 2.3 percent before the training [91] program.

Q. All right. But what I wanted you to answer was, it's true that whites had nearly 98 percent of the craft jobs, prior to the effective date of this contract that's under attack here today?

A. That's true.

Q. With the exception of two black carpenter-painters who were admitted to a training program, is it not also true that the prior industrial experience requirement kept all other black Kaiser employees out of the available training programs?

A. That's right.

Q. But for those two black carpenter-painter trainees, every other on-the-job training program selectee or trainee, until the institution of this program, were white, is that right?

A. Yes.

Q. From your eight or so years' experience, Mr. English, with Kaiser, have you always worked in the area of industrial relations?

A. Yes, I have.

Q. Would it be a fair statement, from your experience, to say that at the plants you have worked at and the plants you have visited, both Kaiser plants and other plants in the industry, that the craft jobs are [92] white dominated, in the vast majority of the instances?

A. I think that the Kaiser plant is very representative of our industry and other industries, in that respect.

Q. Would you say that was also true, regardless of what the available black population was? I don't mean craft population, I mean general hire population. If it's five percent or 39 percent, or somewhere in between, the crafts are still mostly all white?

A. That is right.

Q. Now, Mr. Fontham asked you whether or not it was true that one day, because of your post-1969 hiring ratio of one-for-one, that blacks would have greater opportunities to get craft jobs than whites, by using straight seniority, do you recall the question?

A. Yes, I do.

Q. Now, with respect to that question and to your answer to him, assuming that is true, it will take an awful lot of years before that comes true, isn't that a fact?

A. I think it will take a lot of years.

Q. Is it also true that by the time blacks reach that seniority status, or there are so many blacks where they will have such an opportunity, that most of the blacks, or many of the black employees who are at [93] your plant now and might desire a craft job, might be retired or gone, or no longer Kaiser employees, and will it take that long?

A. Well, yeah, there will be a lot of them gone or hired, but on the other hand, some coming up.

Q. It could take as much as 15 or 20 years before people who are hired this year are going to attain a seniority level to allow them to compete on straight seniority for these jobs?

A. Yeah, we have found that even under the 50/50 hiring ratio at the gate for production type jobs, that we are only increasing our minority percentage about one percent per year.

Q. And the minority percentage of all employees at the Gramercy works, as I understand your testimony, is roughly 15 percent?

A. 15.8, as of December '74.

Q. And this is despite the fact that there is an available black work force of some 39 percent and, also, despite the fact that Kaiser has been hiring on a one-for-one basis since about 1969?

A. That's right.

Q. And that one percent increase, just for the record, that's been about one percent per year since 1969?

A. Yes, it has.

[94] Q. Have you received the bids for the jobs that were posted, beginning April 1974?

A. Yes.

Q. From those bid records, can you determine whether or not Mr. Weber would have been successful in any of his bids, had you followed straight seniority, as he suggests?

A. I just took another look here when Mr. Weber was being questioned. On those three bids, he was somewhere between the 35th and the 40th most senior guy on each of the three different bids, and even though there were some senior employees who turned down their opportunity when they had the chance to get in after bidding, on any kind of a comparative ratio basis of employees turning down jobs, now, in the plant, I don't think that Mr. Weber would have gotten into any of these programs this time around. These are pretty choice jobs, especially at the start of the training program.

Q. Now, Mr. Weber actually is in no different shape from the blacks who you're hiring today, one of these days, he'll become senior enough to get one of those training programs, if he's still interested, isn't that true?

A. That's true.

[95] Mr. Falkenberry: That's all.

By Mr. Fontham:

Q. If vacancies arrive and it becomes necessary, Kaiser will still continue to hire craftsmen from outside the plant, if necessary, is that right?

A. That is right.

Q. So, if for one reason or another, black craftsmen become available from outside the plant, you could raise the ratio of black craftsmen in the plant relatively sooner than you could with regard to the training programs, is that right?

A. Under the terms of the Memorandum of Understanding, in addition to our agreement to fill trainee vacancies on a 50/50 basis, we have also agreed to attempt to hire from the outside on a 50/50 basis, and we will do that in every case that we hire from the outside. At the same time,

we realize that the outside availability is not going to significantly change for many years, also.

Mr. Fontham: Thank you.

The Court: Any other questions, gentlemen?

Mr. Falkenberry: No.

The Court: Thank you, sir. You may step down.

(Witness excused.)

The Court: Call your next witness.

[96] Mr. Middleton: Mr. Bouble.

THOMAS M. BOUBLE,

after being first duly sworn, was examined and testified as follows:

Examination

By Mr. Middleton:

Q. Mr. Bouble, where do you live, please?

A. Walnut Creek, California.

Q. By whom are you employed?

A. Kaiser Aluminum & Chemical Corporation.

Q. How long have you been employed by Kaiser Aluminum & Chemical Corporation?

A. Nineteen years, plus.

Q. What is your present position and responsibility with the company?

A. I'm the director of equal opportunity affairs.

Q. Is that for the entire Kaiser corporation?

A. Yes, it is.

Q. And how long has that been your job?

A. Eight years.

Q. In that connection, do you have any familiarity with the [97] company's policy and background with regard to equal employment opportunity?

A. Certainly.

Q. That's your one and only job, I assume?

A. That's right.

Q. Could you state, sir, what the company's position has been with regard to equal employment opportunity, over the past years, that you have been familiar with?

A. I think that the posture of the company has not changed substantially in the last eight or ten years. We not only accepted, we welcomed the concept of equal employment opportunity. We made it a part of our policy, a very integral part of our policy. We have carried it out as policy in many instances, as a prime mover, vis-a-vis, the law. We think it has been a major contributor to the management of human resources in the corporation, all employees. The elimination of barriers works to the benefit of everybody who works for us.

Q. Now, in that connection, have you noticed whether there appeared to be any discrepancies with regard to the employment of minorities in skilled craft work at various plants of the company?

A. I think that's a classical industrial problem in every [98] industry in the United States, and in every area of the United States. It's been the principal issue, I guess, in trying to achieve equal employment opportunity for all citizens.

Q. Are you personally aware of the practical, or background basis for this discrepancy in apparent employment opportunity in skilled trades for blacks?

A. My personal opinion is, it's a direct result of employment discrimination over the years, the lack of opportunity on the part of the blacks in some areas of the community, Mexican-Americans, certainly, women, to obtain the kind of training that was necessary to achieve the skills.

Q. Has any program been followed by the company, prior to the 1974 master agreement with the Steelworkers

Union, to secure qualified minority employees in the skilled craft groups?

A. It has been a major effort in every one of our facilities since the inception of the affirmative action. I think there has been a very clear recognition that the craft jobs are the premier skills of the blue collar workers, and the issue has not been the hiring of production employees, that's not the problem, and there is a multitude of ways that we have attempted to achieve this, and a multitude of [99] organizations and so forth we work through, and with, to achieve it.

Q. To what degree did any of these achieve any marked success in obtaining opportunities, or furnishing jobs in the skilled crafts to minority employees?

A. They were, fundamentally, unsuccessful.

Q. As a result of that, did you or anyone else representing the company reach any conclusions as to what, then, would have to be done to bring about any substantial measure of relief?

A. Oh, yeah, I think that prior to the 1974 Steelworkers negotiations, and there have been lots of discussions about this, I think anybody who has been active in the field of equal employment opportunity, affirmative action, recognized that unless employers and unions, jointly or severally, did something creative, in effect, to change the pattern, that there would be no change in the present effects of past discrimination, as it relates to craft occupations, and I think that it was totally consistent with the concept of affirmative action that the Steelworkers and the members of this industry and our company came up with the concept that appeared in our 1974 labor agreement. Something had to be done to change the scene, and the concept of changing seniority systems [100] to broaden opportunities, the concept of aggressively, creatively, changing the method by which we manage our human resources, this was not inconsistent with what was going on in the industry. Certainly, it was not inconsistent with the Court

decisions. Certainly, it was not inconsistent with the best thinking of the professionals in this field in this country, whether they are with companies, civil rights organizations, Federal government.

Q. Are you explaining, then, sir, why the new procedure for craft training was instituted as part of the 1974 agreement?

A. Absolutely.

Q. Could you state, as specifically as you know, and I would assume you know, since this falls within your area of corporate responsibility, what the background reasons were, specifically, for the change in program instituted in the 1974 agreement?

A. Certainly. In the latter part of 1973, it was very apparent to us, as a company, that if we were going to bring into our industry minorities, we happen to be talking about blacks in this particular area, into the craft occupations, we felt we would have to, as a company, modify our seniority applications, which would give preference, in fact, to minorities. [101] As I indicated, that was not, of course, an original idea in the total concept of affirmative action, but in the latter part of 1973, Mr. Stewart, who is our Vice-President of industrial relations, and I, in meetings with the Steelworkers, discussed this problem with them. There was certainly a concert of opinion that there was a problem, and one that had to be solved, so that they were preparatory discussions, prior to the negotiations, that there had to be some solution arrived at to change the situation.

Q. Other than compliance with the proper management of human resources and compliance with the company's own policy, and perhaps, the Steelworkers' own policy, were there any practical, pragmatic reasons occurring or taking place that would have added emphasis, perhaps, to the 1974 negotiations?

A. Oh, certainly, any compliance review that we might have had by any agency, and the two agencies that review

us are the Atomic Energy Commission and the Department of Defense, I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review [102] officers, that we devise and come up with methods and systems to change that particular thing. I suppose, as a company, we could have taken a position that we will advertise in all the black newspapers, we will do this and we will do that, and end up with the conclusion that the availability of qualified minorities in the market place for employment with craft skills is minimal, and end up baying at the moon, as it were. But I don't think the concepts of affirmative action permit a company—I don't think it permitted us, policy wise, to merely say we can't do anything about this problem, because it permeates all the things that affirmative action is concerned with.

Q. In your observations and in your opinion, did the very small statistical presence of minorities in the craft groups indicate that there had, in fact, been discrimination in the craft groups?

A. Absolutely. There had not been, over the years—minorities, obviously, had not been permitted to participate in certain skilled occupations and, therefore, they couldn't be available in any quantity in the market place.

Q. Now, sir, you have been discussing, I assume, in your previous answers, the company's situation and [103] employment situation, generally, at all its plants?

A. All the plants, I don't think there is any difference in any facility that we have, in terms of the availability of skilled craft people in the market place that are minority or women.

Q. To your knowledge, sir, was a similar problem, and a similar attempt to solve it, utilized by any other major corporations in the same or related business to Kaiser?

A. You mean in the contract?

Q. Yes, this method of approach that's adopted in the 1974 agreement?

A. It's adopted in the aluminum industry, the steel industry, the can industry, and I'm sure that if you went out and investigated, you would find that there are industries, smaller, independent, or otherwise, that have arrived at the same conclusions and applied the same principles.

Q. Is it fair to say that the principle and the approach here under consideration, the craft training program on a one-for-one basis, pending arrival at objective pecentage goals, is one that has been adopted by a large number of national companies and corporations that involves, perhaps, 50 or 100 different plants around the country?

[104] A. Certainly.

Q. And perhaps hundreds of thousands of employees?

A. Certainly.

Q. And these agreements were reached on the basis, not of the individual facts at Kaiser's Gramercy plant only, but what was deemed, in effect, to be a national problem?

A. Being a national social problem.

Q. Mention has been made, sir, of the Office of Contract Compliance, and the compliance reviews were mentioned. How much pressure, or how much in the way of economic teeth, does this apply to Kaiser, what percentage of Kaiser's business is directly with that business?

A. Our percentage of business with the Government, I would estimate at substantially less than one percent. Our business with other industries that do business with the Government would be, of course, substantial.

Q. Did you, or did any of the other corporate officials dealing with and working out the procedure adopted in the 1974 agreement, have in mind any effort to comply with national policy, as I understand it, rather than just with discussions of the compliance review officers?

Mr. Fontham: Your Honor, at this point, I'm going to object to this witness, who has repeatedly referred [105] to

court decisions, being in harmony with court decisions, and national policy and so forth, unless some foundation for all of this is established, as he's being the purveyor of whatever the national policy is. I know of no national policy which requires racial quota, and I would like to see the foundation for all these statements before he gets to testimony about it. I object, Your Honor.

The Court: I think I'll overrule the objection. The witness, I think, is entitled to state these things in order to show the state of mind of his company, what the court decisions may or may not have meant, but to the extent the company, or this witness, may have understood them, I think they may be relevant as showing the state of mind. For that reason, I'll overrule the objection.

By Mr. Middleton:

Q. Can you answer the question?

A. Pose it again, please.

Q. Was this program in any way influenced by what you and those responsible with you for Kaiser's policies were attempting to do, and what you understood to be national policies with regard to employment opportunity?

A. Yes, and that was our understanding. I'm not suggesting [106] that there is a national policy that suggests a 50/50 ratio of employment. I'm suggesting that there is a national policy, and certainly a policy of my corporation, to treat affirmative action in the full scope of what we believe the intent of it to be, and that is, to create equal employment opportunity.

Q. Now, sir, on a pure economic basis, what would be the cheapest procedure, on the pure cost approach, for obtaining qualified craft employees at the various Kaiser plants?

A. Hire them off the street. If we had adequate supply of craftsmen, candidates coming off the street, that would be the logical way for us to fill our craft jobs, rather than train, because training costs money.

Q. And I would assume, sir, that the less background and experience that the trainees have in the particular craft, the more expensive and the longer the program would have to continue?

A. The more prolonged the training program would have to be, that's correct.

Q. Have you, in your position as a corporate official in charge, noticed whether or not there has been any improvement in the statistics, as a result of the [107] '74 agreement, that is, whether there now appears to be more minorities in training for the various craft jobs throughout the company?

A. Certainly, I don't know the figures right off the top of my head, but there is certainly more minorities and women in O.T.J. programs than there ever were before. It almost goes like from zero to something.

Mr. Middleton: I tender the witness.

By Mr. Falkenberry:

Q. Mr. Bouble, the Steelworkers are the largest trade union with whom Kaiser has a collective bargaining relationship, is that correct?

A. That's correct.

Q. And the Steelworkers represent production and maintenance employees at most of the Kaiser plants, nationally?

A. That's correct.

Q. In your position with Kaiser, and in your relationship with the Union, have you gotten some flavor for what the Union's position has been with respect to its willingness, or its desire, towards bringing about equal employment opportunity, at least insofar as its relationship with Kaiser is concerned?

A. Yes. My impression, in our relationships with the Steelworkers' Union and the Kaiser Aluminum & Chemical Corporation, is that they're highly motivated and I [108] have to say the word creative, in attempting to create a

situation of equal employment opportunity and to eliminate the present effects of past discrimination.

Q. Would it be a fair statement to say that the increased training opportunities that Kaiser has provided come, at least in part, from the Union's desire to provide opportunities for its members, as opposed to having new people come from the street?

A. The Steelworkers' position, consistent, has been to have training programs to train craft people, so that our employees and their members in our plants would have the opportunity to learn a trade, right.

Q. Does the contractual provision that we have been litigating about here today, does it take its essence—was it created from the experience that the parties to the contracts had had and were having in the field of equal employment opportunity?

A. Certainly, it had impact on it. The litigation that the various companies have been involved in, the historical relationships with the Federal agencies that we are all concerned with, certainly, the steel agreement, I think it was our position that we should, and certainly been our company's position all along, that we should do those things that are necessary, [109] without having to have it forced down our throat or require us to go into court to comply with the laws of the land.

Q. Would it be a fair statement to say that the 50 percent minority requirement established by the contract is remedial in every respect and is not just a quota to increase racial representation?

Mr. Fontham: I object on the ground it calls for a conclusion.

The Court: Objection sustained.

Mr. Falkenberry: If Your Honor please, I would except. I don't think it calls for a conclusion. I think because the witness participated in the preparation of the document that's under attack here today, he's entitled to——

The Court: You asked him to compare, counsel. I think on the basis of the comparison that you asked him, that does call for a conclusion. You may be able to rephrase the question.

By Mr. Falkenberry:

Q. Really, what I'm asking you, Mr. Bouble, is whether or not the contractual provision here today was remedial?

A. We think it's——

Mr. Fontham: I object to that on the grounds that I [110] think counsel is going to have to be a little more specific in what he means by remedial. Remedial, under some court's decisions, means you take some guy that's discriminated against and correct it.

The Court: I think the question is vague.

Mr. Falkenberry: If I might try one more time?

By Mr. Falkenberry:

Q. Mr. Bouble, when the parties negotiated this training provision, did they consider whether or not there was a necessity, based on the absence of blacks from crafts at Kaiser plants, that there was a need for remedial action which necessitated changing straight seniority application as it applied for training program applicants?

A. Yes, we did consider it to be remedial, in the sense that, in our opinion, there was obviously discrimination in the past, not ours, per se, but the total sum and substance of education and training to obtain skills, that created a situation that called for a remedy such as the one we derived out of our discussions. I think it goes without saying that we would, under any set of circumstances, not intentionally create problems in reference to seniority, if we didn't feel that was a necessary vehicle to remedy a situation. We recognize the concept of [111] seniority and the

importance of it to employees and people in the labor movement.

Q. Does your experience in the field of labor relations, and particularly in equal employment opportunity, indicate that seniority expectation is a pretty sacred thing, as far as trade unions are concerned, and trade unionists?

A. Sure.

Q. Would it be your judgment, based on your experience in these things, that it takes a pretty serious problem to get a trade union to make the kind of seniority modifications made in this instance?

A. Yes, I think it takes a serious problem, and I think it requires a high sense of accountability, both, to be willing to make that kind of a change.

Q. As you would perceive the problem created by such seniority modifications, would most of the discontent from seniority modifications, whether voluntary or judicially ordered, come from white employees, in the EEOC context?

A. Would most of the discontent from that——

Q. From the seniority modifications, generally?

A. Come from white employees, certainly.

Mr. Falkenberry: Nothing further.

By Mr. Fontham:

[112] Q. Mr. Bouble, you have referred, during the course of your testimony, to the present effects of past discrimination. Do I understand you to indicate that these employees that are now being favored were discriminated against by Kaiser?

A. No.

Q. It's your supposition that they may have been discriminated against somewhere else outside the plant, for instance, in school, or by some other party, is that right?

A. My opinion is that the fundamental effects of past discrimination in the field of education, job training,

etcetera, has created the condition that we have to deal with in terms of minority craftsmen.

Q. You're talking about the same factors which led there to be a substantially lower percentage of black lawyers than there were black people in the general population, is that right?

Mr. Falkenberry: If Your Honor please, we object to that sort of comparison. I don't think there is any relationship—no evidence about availability of black lawyers in this case.

The Court: It's cross-examination, objection overruled.

By Mr. Fontham:

Q. The same kind of factors, Mr. Bouble?

[113] A. Yes, I think that the inadequate educational opportunities for certain groups of the citizens in this country, to achieve, it would be the same thing, certainly, for lawyers, for doctors, for engineers. Discrimination is very pervasive.

Q. With regard to these employees at the Kaiser plant, you don't do a study on what their past history was like, do you?

A. No, not specifically. Individuals?

Q. That's right.

A. Man for man, no, I don't think we examine each and every individual and what his opportunities and so forth might have been, no.

Q. You don't do a study to determine if some black employee had fewer educational opportunities, say, than Mr. Weber did, is that right?

A. No. We would not do that with all the employees in our corporation. No, I think that on a general basis, we have a familiarity with that type of situation, from our sum total of our experience.

Q. So, you're talking about general conclusions that you have drawn from the sum total of your experience, and one

of the general conclusions that you have drawn is that blacks, in general, have been discriminated against in the past, is that right?

[114] A. Certainly.

Q. Now, is it also possibly one of your general conclusions that there may be some blacks who haven't been discriminated against in the past?

A. In certain aspects, certainly.

Q. Is it possible that there may be some whites who have had substantially lower educational opportunities than other whites?

A. Certainly.

Q. Is it possible that there may be some whites who have had substantially lower educational opportunities than blacks?

A. Yes.

Q. Is it possible that, in fact, in this case, all of the whites who were passed over lacked the skills that the blacks lacked?

A. You're talking about prior experience, in this particular case?

Q. That's right.

A. Well, I understand that was the case.

Q. Mr. Weber didn't have craftsman experience, just like the blacks didn't have craftsman experience, isn't that right?

A. That's my understanding

Q. Now, with regard to what you're doing in this case, I [115] take it that you understand that seniority has been the major criterion for selections for on-the-job training programs in the past, is that right?

A. That's right.

Q. So, you recognized that when you waive the number one requirement, the seniority requirement, and you take a black with less seniority than a white, you're thereby favoring the black on grounds of race, is that right?

A. He's getting preferential treatment, that's correct.

Q. So, the black is being selected for a program primarily on the basis of his race, is that right?

A. His being one of the protected class, that's correct.

Q. And by the same token, when that selection is made, there is a white who is being discriminated against on the basis of race?

A. By virtue of changing the application of seniority. Well, I could answer that both ways. I could say yes, the white candidate is not getting the privileges he had under a prior circumstance, when seniority was the only consideration. Yeah, I guess you would say that.

Q. He's not getting the priority he would have had except for the fact that he's white?

A. Except for the fact that he is white?

[116] Q. That's right.

A. Well, he may have been female.

Q. So, at this point, Kaiser has now created a situation in which not only is there some general supposition that blacks have been discriminated against in the past, but Kaiser has made sure that there are some whites that have been discriminated against, is that right, on grounds of race?

A. No, I don't think that is correct. I think their opportunities have been modified, and, certainly, that was not the intent. Our objective has not been to develop rationales to defeat the concept of affirmative action and equal employment opportunity. Our concept has been to try to devise means by which we can deal with a fundamental issue.

Q. Is your position that the issue is fundamental when a black has been discriminated against in the past, but not when a white has been deprived of the same opportunities?

A. I think that's a very obvious significant social question today, is what must be done or should be done to create the pressing effects of past discrimination, if there are any other. One of the interesting experiences we have, you know, in this business of trying to do what we think is

proper and legal and [117] so forth, is that we have built a mousetrap, as it were. The industry, particularly, has the responsibility for dealing with this issue. We have to ride the horse that is being beat, as it were. We use our best judgments to build the mousetrap that will least disrupt the system and still achieve the goal, other than trying to find rationales for not doing it.

Q. Mr. Bouble, I'm not questioning your motives, but I'm questioning some of your conclusions. With regard to the employees that apply at these plants, black or white, do you have any mechanisms on your applications for determining what their past history was, or who has discriminated against them outside the plant?

A. No, we don't ask who's discriminated against them outside the plant. We certainly seek out their work experience, their education. We don't ask for any evidence of their prior discrimination.

Q. Then, when you favor a black because he's black, under the training programs, you really don't know if he's previously been discriminated against, vis-a-vis, a white in the outside world, is that correct?

A. I think that begs the issue, but on each individual person, I would have to say no, we don't individually and specifically, but I'm fundamentally satisfied [118] that the vast majority could present a dossier of experience that would substantiate it.

Q. With regard to getting into training programs, Mr. Bouble, do you have any general supposition that the vast majority of the applicants would be able to show that they tried to become a trainee somewhere and they weren't allowed to?

A. Would I make that assumption?

Q. Yes.

A. I suppose, as a general statement, based on my experience, I can make a presumption that the vast majority of minorities have not had the training opportunities and have been, either through artificial barriers or pure rejec-

tion, deprived of those opportunities. Yes, that would be my personal opinion.

Q. We're talking about the craft men. Keep in mind, we have an awful lot of white people who didn't have the craft experience.

A. We have an example of our Baton Rouge facility, and there, our craft employees are represented by the building trades, where we requested that building trades provide us with minority candidates, and in the majority of situations, they were unable to because there weren't any in the building trades, and we had to go out and recruit minority candidates [119] for craft positions there. I think there is ample, and has been ample evidence presented in the last six or eight years that minorities were discriminated, in fact, in terms of their ability to get into the building trades occupations.

Q. Let's get the question straight, sir, so I know what you're saying, now. The majority of your workers who are black at the Gramercy plant tried to get into crafts and were denied the opportunity?

A. No, that is not the question I'm answering.

Q. Why don't you answer that one?

A. I don't know what that answer would be.

Q. Now, with regard to this 50 percent quota that you all have installed on the basis of race at the Gramercy plant, would you say that that is a quota for non-whites, established in proportion to the percentage of non-whites in the labor market area?

A. No. If I understand your question properly, that same 50/50, as it's called, hiring, or going to the programs, is applicable in all our facilities, even where the minority population of that area might be as low as two percent, three percent.

Q. But am I not correct in stating that the goal of the 50/50 is to bring the minority representation up to the proportion or percentage for non-whites in the [120] labor market area?

A. Yes, certainly. That's a long-range goal, and, certainly, that's the intent, to increase the representation of minorities that will approximate the participation in the labor market, right.

Q. Would you say that with respect to training programs, your quota gives negroes, or blacks, other minorities, special seniority rights, at the expense of white workers hired earlier?

A. Certainly, some white workers, anyway, no question about that.

Q. Would you say that this program that you all have instituted amounts to a change in the occupational qualifications set for employees, simply because proportionately, fewer negroes than whites are able to meet them?

A. No.

Q. You would not say that's true?

A. No, it doesn't change the qualifications for the job.

Q. As I understood it, there used to be a training qualification before you could get into a training program?

A. Oh, excuse me just a moment. Maybe I misunderstood your question. The prior experience requirements for the training program has been eliminated.

Q. Because, partially, at least, there were proportionately [121] fewer negroes than whites able to meet them, is that right?

A. You mean, is that the motive behind that?

Q. Yes.

A. No, that was not the exclusive motive. You see, first of all, you have to recognize we have had, in my company, minimal to zero training programs of this sort. We're talking, now, about training people from scratch, as it were, be they black or white or female. So, we didn't feel that it was very intelligent to impose an experience qualification that couldn't draw any of our own employees into the program. That would be self-defeating.

Q. Let me switch gears and change that, because I was a little confused myself when I started that question. If we

assume, or if we treat seniority as the occupational qualification, this program is a changing of occupational qualifications, simply because, proportionately, fewer negroes than whites are able to meet them?

Mr. Falkenberry: If Your Honor please, I object to that question on the ground, as a matter of law, seniority is not a qualification. I think every court in every district in the United States has held seniority and qualifications are entirely [122] separate things, and it calls for a conclusion of law, which is erroneous.

Mr. Fontham: Your Honor, I'm not referring to this in any sense of the term of art, but I think it's established by the testimony that the sole qualification, in this case, was length of time in service, and to that extent, it's an occupational qualification.

The Court: I think the evidence we have heard so far is permissible and relevant and doesn't call for a conclusion, in the sense that seniority is not being used in anything other than the sense that it has been used throughout this trial, as referring to a basis for qualification in the past, without regard to the merit or demerit of it.

Mr. Falkenberry: I understand what Your Honor says, I make that objection just for the record. I want to make sure if we wind up on Camp Street, the Court of Appeals understands it. I think the Court of Appeals has a very different understanding. While seniority may be a requirement, it is not a qualification. When Mr. Fontham talks in terms of bona fide occupational qualifications, that is a term of art under Title 7 litigation.

The Court: Mr. Fontham, perhaps you better ask the [123] question again. I think it's been lost in the argument.

By Mr. Fontham:

Q. Mr. Bouble, to the extent that the prerequisite, or qualification, for these on-the-job training programs has

been seniority, the institution of this program is, in effect, a change in the qualifications set for employees to enter the training programs, simply because, proportionately, fewer negroes than whites are able to meet them, is that correct?

Mr. Middleton: Your Honor, I'm not sure I can understand that question, myself.

The Court: Well, I understand it.

Mr. Middleton: I want to enter a formal objection that this is asking for a very legalistic conclusion for the witness, that on a question so complex that in my own—

The Court: I think I understood it. I think the witness may be confused. Let's ask the witness if he understands it.

The Witness: Let me tell you what I think the question is. Are you asking me if the experience requirement that was previously there—

By Mr. Fontham:

Q. I'm talking about seniority only, length of time in [124] service. This change in the program was instituted because, proportionately, fewer negroes had the length of time in service to accomplish the goals you wanted to accomplish, by using the straight seniority basis, is that right?

A. You're asking, did we modify the seniority in order to enhance the movement of minorities into craft occupations, the answer is yes.

Q. And although you have some general opinions, based on fairly decent evidence, I'm sure, with regard to general discrimination against blacks in America, you have no evidence, necessarily, that the persons being preferred under this program are actually victims of previous discrimination, is that right?

A. No, I personally do not have that kind of evidence on each of the individuals that are working in our Gramercy plant. I might add that in my particular responsibility, I would not pursue that.

The Court: Is there anything in the plan designed to determine that?

The Witness: To determine whether or not there have been prior discrimination?

The Court: Yes, on an individual basis.

The Witness: No.

By Mr. Fontham:

[125] Q. Finally, Mr. Bouble, I take it that especially in regard to the fact that you all have undertaken affirmative action to a large extent, Kaiser's position is that discrimination against these blacks in the past has been by somebody other than Kaiser, is that correct?

A. You mean at Gramercy, or are you talking generally or broadly? I don't think there is any employer in the United States, prior to a given time in our history, that didn't practice employment discrimination in some form.

Q. Since the opening of the Gramercy plant?

A. This is historically. No, I know of no specific evidence of discrimination at the Gramercy plant. Had there been, we would have tried to correct it.

Mr. Fontham: I have no further questions.

The Court: Mr. Bouble, I would like to clarify just a few matters. You obviously have expertise in this field. You have referred repeatedly to the concept of affirmative action. Without appearing stupid, as I think I understand what's encompassed in that, however, I would like for you to tell me, if you know, what the genesis was of the concept of affirmative action, as you understand that genesis to be.

The Witness: You mean the terminology, or the concept, [126] per se?

The Court: The concept, without regard to the terminology. First, perhaps I should ask you to define affirmative

action, as you understand it to be, then we can go from that and we'll get the concept, and then we can go on with the genesis of the concept. Since you referred to the term "affirmative action", why don't we get your definition of it? I'm not holding you to any legalistic precision, I'm merely trying to get your general understanding, as you appreciate it.

The Witness: I think the concept of affirmative action, affirmative action is a plan for an employer to develop, to do all of those things that creates opportunities of employment for all citizens. In the process of that, to remove barriers that would make that affirmative action a hollow gesture. It's not a passive thing, there is a difference between equal employment opportunity and affirmative action. Those are not synonymous. Opening the doors of employment to minorities or females, where previously they had been barred from employment, is but one step. To then create an employment environment where they can achieve and compete and perform is where you get into the concept of affirmative action. [127] I think affirmative action calls for remedial measures.

The Court: In other words, I take it that included within the concept of affirmative action, as you understand it to be, is color awareness, as opposed to color blindness, with regard to those with whom you're dealing?

The Witness: Certainly. Yes, you would have to be aware of that.

The Court: And with such awareness, giving certain preference or priorities to those whom you feel have been deprived at some time by someone, so as to affirmatively remedy these prior deprivations, either against individuals or a class of individuals?

The Witness: I think that's fair. I think it calls for preferential considerations.

The Court: And I take it that you have, by virtue of your position, given a great deal of study to the concept of affirmative action, as it particularly can be applied in employment in the industry?

The Witness: Well, I hope I have. I spent the last eight years working with it.

The Court: Now, can you tell me where the genesis of this concept originated?

The Witness: Well, as far as I'm concerned, it originated [128] out of the Executive Orders and the regulations that were issued from the Executive Orders, to define a program of correction in the plans for progression, in fact, developed affirmative action concepts. Some of the language that came into Order 4 was language and concepts that came directly from the work for plants for progression, which was a joint effort on the part of the industry to create employment opportunity.

The Court: When did that happen?

The Witness: Civil Rights Act was passed in '64. '63, '62, right in there.

The Court: Prior to the Civil Rights Act?

The Witness: Prior to the Civil Rights Act. I'm pretty sure of that, on that timing. I may be off.

The Court: Now, are you relatively sure that it was prior to the passage of the Civil Rights Act?

The Witness: Yeah, I'm not sure of that. I'm not exactly sure what the date was, but it was prior to the passage of the Civil Rights Act.

The Court: I assume, therefore, that having considered the ramifications of the concept of affirmative action and its genesis, that you have considered that being aware of color, for example, take one aspect of discrimination, taking action pursuant to [129] color, involves making discriminatory decisions, in the sense that one is discriminating, or making decisions based upon color. I presume you have taken that into account?

The Witness: Certainly. I think the question of preference for people, because of color, race, religion, sex, certainly has been taken into account as a practical matter.

The Court: I assume that in taking into account the positive aspects of it, that is, the preference, you have also taken into account the negative aspects, that is, the detriment that would flow to those who, for one reason or another, belong to a group or class not considered to have been deprived, for whom affirmative, positive steps are not deemed necessary?

The Witness: We recognize, and have recognized, that certain aspects of affirmative action do work to the detriment of some employees.

The Court: And without dealing in legalisms, or without trying in any way to do anything other than ventilate all of the issues, this is what has come to be known, generally, as reverse discrimination, I believe?

The Witness: That's referred to from time to time by our [130] white employees as reverse discrimination, yes.

The Court: I think by legal scholars and others, if you have studied any of them, as a fallout of affirmative action?

The Witness: I think that would be a correct statement. I don't know reverse discrimination is really the proper inference.

The Court: To the extent that you have agreed with me, I believe, that to the extent you make decisions based upon color, you're discriminating?

The Witness: Yes.

The Court: That doesn't mean it's negative or positive, but it is a discriminating type decision, in the generic sense of the word?

The Witness: Right, as a practical matter.

The Court: Without attempting to characterize it as evil or bad, it is an action based upon recognition of color, in this instance?

The Witness: Yes, sir.

The Court: Or sex or national origin or religion, or some other basis for which negative discrimination has been prohibited by law?

The Witness: Right.

The Court: Now, you have indicated that this concept of affirmative action, and inherent in that, if I may [131] call it reverse discrimination without in any way implying that it's evil, had its genesis in Executive Orders, as far as you know?

The Witness: Yes.

The Court: And I think you testified that, at least according to your understanding, various court decisions have encompassed that concept, insofar as imposing sanctions upon companies or industries?

The Witness: That's right.

The Court: Have you ever made any studies to determine whether the Congress had passed any legislation permitting or authorizing discrimination against individuals in order to carry out affirmative action plans?

The Witness: Well, I have done much reading over periods of time, some of which, I guess, I retained, and some I haven't, as to the intent of Congress and the supportive legislation, or the legislation in the Civil Rights area.

The Court: Well, have you found, or have any of your legal advisors shown you Congressional acts to support discrimination when carried out pursuant to a plan of affirmative action?

The Witness: I would have to say no, if I understand your question correctly.

[132] The Court: Have you considered, in connection with the concept of affirmative action, which developed prior to the 1964 Civil Rights Act, and in connection with your study of it, have you considered whether the Congress, by virtue of the passage of the 1964 Civil Rights Act, deprived individuals of liberties to discriminate in pursuance of what they considered to be worthy causes, such as affirmative action, by virtue of their broad and sweeping prohibition against discrimination against individuals on race or for any reason?

The Witness: I understand your question to be, have I considered the fact that the Civil Rights Act prohibits the privilege of discriminating?

The Court: For what would be considered a worthy purpose, prior to the passage of that Act, has that been considered or taken into account in your decision with regard to implementation of plans subsequent to 1964?

The Witness: What we were talking about earlier, of reverse discrimination, has inevitably permeated the thinking of discussions, when one gets into the concepts of affirmative action plans, by anybody in the business that has to deal with that. I think that the professionals, I use that term in reference [133] to people who have worked in this area for extended periods of time, were cognizant of that issue, but I think the practical evidence from the Government agencies with whom industry had to deal, I think my impression of the court decisions, I can find no serious conflict in it, between the objective of the Civil Rights Act and the objective of affirmative action. I think they run in tandem.

The Court: You're saying, in effect, that based upon expressions by Governmental agencies, the hidden Government, as its been referred to, I think, by many individuals,

and by the handwriting on the wall, if I may characterize what you have referred to as what the courts have done, you have considered that that really has been your motivating factor in determining what steps to take with regard to affirmative action, and that you have considered the general purpose of the Civil Rights Act passed by the Congress to be consistent, or these actions to be consistent with the general purpose of the Civil Rights Act?

The Witness: In my opinion, the concepts of affirmative action are consistent with the Civil Rights Act. I think had the Civil Rights Act been passed with the hindsight of the last ten years, the Act, in my [134] opinion, would have encompassed the full concepts of affirmative action. In fact, the EEOC, in carrying out their responsibilities under the Civil Rights Act, deal with the concept of affirmative action in agreements they seek to obtain from employers. I think the advent of Executive Order 11246, and the subsequent regulations, and the history of the last ten years, are not inconsistent with the fundamental intent of the Civil Rights Act. As a pragmatic thing to say, if all the Civil Rights Act said—maybe I shouldn't get into this kind of dialogue, but if all the Civil Rights Act said, "From henceforth there will be discrimination", it would have been a hollow kind of a thing, because so much of the discrimination was systemic. The system had to be changed.

The Court: Was the Civil Rights Act, as you understand it, designed to promote affirmative action, or to prevent discrimination?

The Witness: I suppose I'm getting out of my ballpark here.

The Court: If you are, I assumed you were an expert in the field, to the extent of your position.

The Witness: I think I'm an expert in the field of affirmative action. I'm not an expert in interpreting [135] the intent of the Civil Rights Act.

The Court: I'm not trying to get you in any pitfalls, I'm concerned about the dichotomy, and I thought perhaps you might be able to give meaningful assistance. On the other hand, if you feel that I'm asking you questions that go beyond your expertise, I would appreciate your telling me.

The Witness: It's opinion on my part. I think the Civil Rights Act was passed to prevent discrimination in a number of areas, one of which was employment.

The Court: Frankly, I'm concerned. Perhaps if I explain my concern. I find that the Act is rather clear and specific in prohibiting discrimination against individuals, particularly on the basis of race, and particularly in on-the-job training programs such as this, and I'm just curious as to why those who have been in charge of companies' programs, such as you, attempting to comply with what I'm sure is a plethora of pressure from many sides and do the right thing, and I'm just curious how, in resolving these various conflicts, the rather clear language of the Congress has been reconciled with these actions, if it has been reconciled. Frankly, I'm looking for guidance when I asked you that question, if there has been any reconciliation. If, [136] on the other hand, it has been ignored, simply because the pressures from other Governmental agencies, or the desire to do what you felt was right was considered paramount and consistent with what you consider the general purpose of the Civil Rights Act, then I would like to know that. In other words, I'm trying to find out whether there was an attempt to evade the Civil Rights Act, as written by Congress, or whether there was an attempt to do what many considered the right thing. Now, if I'm over-generalizing, please don't answer the question. It appears to me to be a dichotomy which goes to the very thrust, to the very heart of this problem, and to the fullest extent possible, I would like to give you and all the parties an opportunity to ventilate it.

The Witness: I don't have any problem attempting to respond to that. I don't believe there has been a more changing field of activity in this country today than the impact that's occurred in the employment field as a result of affirmative action. My personal opinion is that when the Civil Rights Act was passed, that the collective intelligence, the collective information of the effects of employment discrimination, and the changes that would inevitably [137] occur, were probably, in my opinion, not considered in depth. I don't think there has been the kind of exploration into the subject that has occurred in the last ten years by many, many organizations, industries, Government, courts, educators, etcetera. It has been a growing revelation, I guess. I don't think, in response, that the pressures, per se, of the Federal agencies responsible, say, for compliance, have brought industry to their knees and forced them to do things that they didn't think, in their good judgment, were appropriate responsibilities on their part. I think it's been a learning, growing process. I find it difficult, as a person having been involved in it, to reach back and seize some language to defeat the concepts of affirmative action. I don't think that would be consistent with the whole thrust of the Civil Rights Act.

The Court: You're saying, in effect, that the Civil Rights Act needs amending?

The Witness: I think if that point needs to be cleared up, it needs amending, yes. I think there has been a total new awareness on the part of many, many people. I spend a lot of time within my corporation going around and talking with our employees about this subject. To that extent, I'm the in-house [138] advocate, and I find, as time goes by, with a broader understanding of the issues, the acceptability of affirmative action concepts gains a higher level all the time, I think. People who are in the employment scene are beginning to intellectually accept some

of the concepts of affirmative action that might not have been acceptable eight years ago, or nine years ago, or five years ago.

The Court: All right, sir. Thank you very much. I have enjoyed the questioning with you and find it helpful.

Gentlemen, if I have raised any areas you wish to pursue, I'll give you an opportunity to cross-examine the witness further.

Mr. Fontham: Your Honor, I have no further questions of this witness.

The Court: I think, in any event, Mr. Middleton has not had the opportunity to redirect.

Mr. Middleton: I don't believe I have anything else. I think most of the points about which he's thoroughly acquainted and some he isn't have been thoroughly explored.

Mr. Falkenberry: I don't have anything else of Mr. Bouble.

The Court: You're excused.

[139] (Witness excused.)

The Court: Any further evidence, gentlemen?

Mr. Middleton: Your Honor, that's all we planned.

Mr. Falkenberry: We have no more.

The Court: Any rebuttal?

Mr. Fontham: No, Your Honor.

The Court: Any motions to be made at the conclusion of all evidence?

All right, gentlemen, in accordance with our prior understanding at the pre-trial conference, the Court will give counsel an opportunity to brief the issues. It's true that

Mr. Fontham, in behalf of the Plaintiff, has filed a Pre-Trial Memorandum, and that the Union has filed a Pre-Trial Memorandum, which I just received this morning and really haven't had an opportunity to do anything other than scan it most hastily. For some reason, it was not delivered to my office until late yesterday.

Mr. Falkenberry: Yes, Your Honor.

The Court: So, I really haven't had a chance to review it, and Mr. Middleton, of course, relying upon our assertion, was waiting until after the hearing.

Let me ask you, first, in arriving at a timetable, gentlemen, because I recognize that this matter can be of substantial importance to you, [140] whether you feel you want to have a transcript as a prerequisite to preparation of briefs? Ordinarily, I don't favor delays for a transcript. I do think my reporter could probably get a transcript out in a relatively short period of time. I assume that the case may have to have a transcript ultimately.

Mr. Fontham: Your Honor, the Plaintiff has no need of a transcript, mainly because we have stipulated so many of the basic facts, that I really think that much of the testimony was sort of incidental. But I don't have any need of one prior to filing a brief.

Mr. Middleton: Your Honor, that's kind of my general feeling. I think we have got, really, absent the testimony, practically speaking, enough stipulated pleaded facts to pretty well crystalize most of the legal issues involved.

The Court: Well, in a vacuum, I think that may be true. Personally, gentlemen, considering the rather significant social importance of the problem, to approach it from a pure, hard fact statistical basis may not provide adequate basis for consideration. I'll leave it up to you. I was going to say, I think that I would certainly give you time to get

a transcript if you wanted that opportunity to do so. If you don't feel you need it, then it's solely up to you.

[141] Mr. Middleton: Frankly, one thing I had in mind—

The Court: I don't want to cause the parties to go to an expense of a transcript if it isn't necessary. On the other hand, I can foresee that there may be one required ultimately, in any event.

Mr. Middleton: I feel sure there will be, if it please the Court.

The Court: Regardless.

Mr. Middleton: One thing about the transcript, we've got the Bar trip looming not too far off. I was fearful that by the time we get the transcript and then work on the brief, we would be needing to finish it by the time we might not be here, and I would go ahead and try to get that taken care of prior to May 1st.

The Court: All right. Gentlemen, let me tell you, generally, if you haven't already perceived the problems as I view them, based upon the study that I have made, the evidence that I have seen in this case, so that you may address yourselves to them. I don't mean to over-simplify the problem, but I think it is susceptible to simplification and I do think it has rather broad ramifications for the nation. It appears to me that we have the rather positive language of the Civil Rights Act, prohibiting [142] any discrimination, albeit benign or benevolent. It further appears from Congressional history that's been cited to me by Mr. Fontham, maybe there are others not cited to me, that the Congress, in enacting the Civil Rights Act of 1964, specifically considered this problem and concluded that it was not licensing what one might call reverse discrimination. It appears to me, therefore, we're faced with the problem of whether national policy with regard to affirmative action, if you wish to call it that, benign or benevolent discrimination, if you wish to call it that, should

be made, on the one hand, by the elected representatives of the citizens, that is, the Congress, or on the other hand, by the invisible Government in the form of agency representatives, or bureaucrats, as they're frequently referred to, or even worse, or better, depending upon one's point of view, by tenured Judges who have no one to answer to, other than their consciences. If the Civil Rights Act needs to be amended to permit affirmative action and if affirmative action is a national policy, it occurs to me that a very strong and persuasive argument can be made for the proposition that it should be done by that branch of our Government which is now endowed with responsibility [143] of establishing a national direction, and not by tenured individuals, such as Federal Judges. Therefore, I have great difficulty in reconciling the fallouts of affirmative action programs with the rather clear and express mandates prohibiting discrimination in the 1964 Act, and that, in substance, and simply stated, gentlemen, are the issues that I think you need to direct yourselves to in connection with memoranda that you are going to submit to me for my decision in this case. I don't know that the issue has been fairly faced in the light that I view it, at this time. I may change my mind, but it seems to me, as I have stated, it is who is going to make the national policy. Now, it's true that the courts have done this in other areas in pursuance of carrying out their duty to interpret the Constitution. Thus, we have instances where the same problem has been faced with Governmental bodies, where you were dealing with Constitutional questions, that is, the right of the Government to discriminate or not to discriminate, or to benevolently discriminate, by the courts in pursuance of their interpreting Constitutional requirements. Frankly, at this time, it seems to me that the Constitution is not the governing document, in view of the fact that we're dealing [144] with private individuals, but, rather, the various Civil Rights Acts. Of course, I've been talking about the Civil Rights Act of '64; I haven't even mentioned Section

1981 that did not come into vogue or popularity until after 1964, when someone neglected to file a suit within the prescriptive period provided by the 1964 Act. But in addition to the prohibitions against discrimination contained in the 1964 Act, we have the rather broad and sweeping prohibitions contained in Section 1981, which the courts have not hesitated to apply to discrimination which they have considered to be malignant, rather than benign. What is malignant and what is benign is subject to different interpretations, depending upon different views. My view, at this time, gentlemen, is that whether it's malignant or benign should be decided by the representatives of the people, as I say, not by tenured Judges.

Now, I haven't meant to pre-judge the case before you all have argued and I assure you that I haven't. It certainly presents many very difficult and broad problems. I have stated my general views of the problems and the issues, as I now see them, because I thought it might be helpful to counsel for all parties in their task of briefing the case.

[145] Now, with that in mind, and there indeed may be other things that I have not mentioned that you feel you should consider, I haven't meant to limit, in any way, your argument, but merely to give you some idea of the problems that I consider most paramount, based upon the evidence as I have heard it and the law that I have seen to this point, so, with that in mind, gentlemen, I'm receptive to such timetable for briefing as you feel is consistent with your schedules and an opportunity to cover completely the significant factors. I say to cover completely, because I don't know how much work you have to do with regard to Congressional history. I don't know how much you have already done. I do know that frequently, for my own problems, frequently because of lack of Government depositories in this area, the Fifth Circuit library, for example, has only been a depository for Government docu-

ments for the last two or three years, I have gone to Washington to get Congressional history and committee reports and what not, and gone back this far, and sometimes it takes me quite a long time to get documents that I'm looking for, and I presume you may have the same problems. So, I would like to have it handled as promptly as possible, consistent [146] with an opportunity for thoroughness. So, if you would like to reflect, or talk amongst yourselves for a few minutes concerning scheduling, I'll be happy to let you all set the timetable that you feel is appropriate. I know none of you wish to delay the matter and, therefore, I'll defer to your judgment.

Mr. Middleton: Judge, I think both of us feel we could file additional briefs on the thing by, say, the 1st of May, and then to the extent, in receipt of each other's, we may need to supplement or deal with something that was overlooked, or deal with some reply brief, whatever time Your Honor would like to allow after that would be appropriate.

The Court: All right. Let's provide for filing of simultaneous briefs by all parties not later than May 1st, reserving the right to either side to file reply or rebuttal briefs by May 10, and, also, reserving the right of the parties to come in for extensions of their periods if for some reason they feel, unforeseen at this time, that such extensions would be in the interest of justice, so as to provide a thorough covering of the necessary material.

Gentlemen, I appreciate your cooperation and the highly professional way this has been handled, and if there is nothing further, the Court will [147] stand adjourned.

(Conclusion.)

[148]

The State of Texas

County of Potter

I, D. Trent Thurman, CSR, RPR and Notary Public in and for Potter County, Texas, do hereby certify that the above and foregoing pages contained a full, true and correct transcription of my shorthand notes taken upon the occasion set forth in the caption hereof, as reduced to typewriting by me or under my direction.

Witness my hand, this the 20 day of September, 1976.

/s/ D. Trent Thurman
D. Trent Thurman, CSR, RPR
Notary Public in and for
Potter County, Texas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

STIPULATION

Brian F. Weber, plaintiff, and Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America AFL-CIO (USWA), defendants, hereby stipulate the truth of the following facts for all purposes in this proceeding.

1.

Jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 2000(e)-5(f)(3), 28 U.S.C. § 1343, and 28 U.S.C. §§ 2201 and 2202.

2.

Plaintiff, Mr. Weber, is now and has been since 1968 an employee of defendant, Kaiser, at the Gramercy, Louisiana Works, and a member of USWA, Local 5702.

3.

Defendant, Kaiser, is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of California. Defendant, USWA, is a labor union. Kaiser is an employer in an industry affecting commerce and employs more than 15 persons. USWA is a labor organization engaged in an industry affecting commerce which has more than 15 members, and which is the certified representative of employees of Kaiser at the Gramercy Works pursuant to the National Labor Relations Act.

4.

On February 1, 1974, Kaiser and USWA entered into an agreement styled "1974 Labor Agreement" purporting to set forth "the basic agreement concerning rates of pay,

hours of work, and conditions of employment to be observed between the parties hereto with respect to the employees covered hereby and as hereafter defined." The agreement provides in part:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:
>
> [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates. . . .
>
> • • • • • • • • • • •
>
> The term "minority" as used herein shall be as defined in EEOC reporting requirements.

A "memorandum of understanding" was executed by Kaiser and USWA as a supplement to the 1974 Labor Agreement. The parties stipulate the authenticity of the 1974 Labor Agreement and memorandum of understanding, which are attached to this Stipulation.

5.

Prior to implementation of the new procedures provided for by the 1974 Labor Agreement, substantially all maintenance and craft personnel employed at Kaiser's Gramercy Works were obtained by the hire of persons qualified and trained in such crafts prior to employment by Kaiser.

The available supply of trained craft and trade personnel available for hire by the Company as new employees has been, and remains to the present time, almost entirely made up of white males.

A previous on-the-job training program in the "Carpenter-Painter" craft category was followed by the Company from 1964 until 1971 whereby employees, with a minimum of one year experience in this category, and who were physically qualified, were offered opportunities for on-the-job training as trainees in this craft. Openings were filled on a bid basis by the senior qualified bidder meeting the criteria set forth. Over the period of this program, only 11 employees entered this craft line, two of whom were black.

A previous on-the-job training program in the "General Repairman" category was followed by the Company from 1968 until 1971 whereby employees with a minimum of three year's experience in this category, and who were physically qualified, were offered opportunities for on-the-job training over a period of two years in this line. This program was modified in 1971 to offer employees with a minimum of two year's experience in this category, and who were physically qualified, on-the-job training over a period of three years in this line. The openings in this training program were filled on a bid basis by the senior qualified bidder meeting the criteria set forth. In this program, 13 trainees entered this line in 1969, 3 trainees entered the line in 1970, and one trainee entered the line in 1971. All of the trainees were white.

No other training programs were instituted by the Company between 1964 and February, 1974.

Despite the Company's training programs, it was still necessary to hire from outside the plant substantial numbers of trained craftsmen and maintenance workers. Vacancies in craft and maintenance positions were difficult or impossible to predict far enough in advance to allow on-

the-job training of employees to fill needed positions. Therefore, the vacancies were filled with personnel obtained outside the plant as the need arose.

6.

Under the "1974 Labor Agreement", a revised and expanded training program, for on-the-job training into crafts, was contemplated without requiring prior experience, based on seniority, but with the provision that at least half of the persons selected, for such training, would be members of minority groups. Under such provisions, bids were posted April 3, 1974, for trainees in the category of Instrument Repair, Electrician, and General Repairman. Following the terms of the "1974 Labor Agreement", one black and one white trainee were selected on the basis of their seniority, within respective groups of bidders from their race, for the Instrument Repair training; two trainees were selected, one black and one white, for training in the Electrician category in accordance with the relative seniority within their respective groups of bidders by race; similarly, five trainees were selected for on-the-job training as General Repairman, three blacks and two whites on the basis of their respective seniority by race. In each instance, one or more white employees, not selected, were more senior than one or more of the black employees selected of the above three on-the-job training programs. On May 7, 1974, a bid sheet was posted for training in the category of Air Conditioning Mechanic in connection with which bidders were restricted to the white race and the successful bidder was the senior white bidder, such that of the four training programs theretofore bid, ten trainees were selected, five white and five black. On October 15, 1974, additional bids were posted for on-the-job training programs in the category of Carpenter and Insulator; two trainees were selected for the Carpenter on-the-job training program, one black and one white, being the most senior successful bidders of their respective races for said program; only one

trainee was selected for the Insulator training and the senior black bidder was selected. Bids had therefore been posted in six different craft categories, since institution of the program under the "1974 Labor Agreement" for the selection of thirteen trainees and of those selected, six have been white and seven have been black.

In each instance, with the exception of the bids for one position as Air Conditioning Mechanic, which was restricted to white bidders only, successful black bidders were junior in seniority to one or more white bidders, who bid unsuccessfully for said position.

With respect to each training program, the seniority of bidders is determined on the basis of their length of employment at the plant and is not affected by departmental or job seniority. All workers at the plant are included in this seniority line.

7.

Mr. Weber and/or other members of the class have applied for each of the 6 training programs posted for bidding since February 1, 1974. However, members of minority groups with less seniority than Mr. Weber and/or other members of the class were selected by defendant Kaiser for these programs, to meet the established quota of at least 50% minority representation as provided for in the 1974 Labor Agreement and Memorandum of Understanding.

8.

The length of craft training programs varies between two and a half and three and a half years, based on the training required in each, following which a trainee successfully completing training would become qualified as the junior man in his particular craft for purposes of lay off, promotion, overtime, and any other advantages. Pay rates for crafts are in general higher than a majority of other jobs at the plant from which prospective bidders may come

and such jobs are considered desirable and advantageous for financial, job security and other reasons. Not all bidders, however, are genuinely interested in securing the training positions as demonstrated by the fact that, in 5 of 6 training programs on which bids were received, eligible employees, more senior than those actually selected, declined the opportunity to enter the training program when offered to them.

9.

Neither the State of Louisiana nor the Town of Gramercy has a law prohibiting discrimination in employment on grounds of race.

10.

The parties stipulate the authenticity and admissability of the following exhibits, copies of which are attached hereto:

Joint Exhibit #1: Excerpts from 1974 Labor Agreement.

Joint Exhibit #2: Copy of Memorandum of Understanding.

Joint Exhibit #3: Bid lists on each of the 6 training programs.

Kaiser Exhibit 1: Craft Families, February, 1975, Kaiser, Gramercy.

Kaiser Exhibit 2: Trainees selected, craft training programs, since February 1, 1974, Kaiser Gramercy Plant.

Kaiser Exhibit 3: Craft employees, Kaiser Gramercy, 1972-1974.

Kaiser Exhibit 4: Report letter (with attached chart) required by Memorandum of Understanding, DEE to Company and Union Representative, dated February 6, 1975.

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JOINT EXHIBIT #1: EXCERPTS FROM 1974 LABOR AGREEMENT

AGREEMENT

between

KAISER ALUMINUM & CHEMICAL CORPORATION

Bay Minette Works	Newark Works
Belpre Works	Norco Works
Chalmette Works	Ravenswood Works
Dolton Works	Spokane (Culvert) Works
Gramercy Works	Tacoma Works
Halethorpe Works	Toledo Works
Mead Works	Trentwood Works

Vancouver Works

and

UNITED STEELWORKERS OF AMERICA AFL-CIO

Local 6632	Local 341
Local 5648	Local 5702
Local 13000	Local 5668
Local 5124	Local 338
Local 5702	Local 7945
Local 4599	Local 7238
Local 329	Local 338

Local 6419

FEBRUARY 1, 1974

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4. Supplemental Memorandum

As an integral part of 1974 Negotiations, the parties have noted that litigation is pending which may have some bearing on employment conditions for female and minority employees in the bargaining unit. Finally, the parties have considered the impact on seniority systems and job security that technological developments, environmental and economic controls, and widely fluctuating business conditions have had and may continue to have on each employee in the bargaining unit.

By reason of these considerations, the parties have agreed to incorporate into the 1974 settlement this supplemental agreement which will enable the parties quickly and effectively to make adjustments or revisions in their seniority and selection practices when judicial decisions dictate such action is necessary. This supplemental agreement will make it possible for the parties to relate such adjustments or revisions to the circumstances prevailing at the time such action is taken and to the conditions then existing at each location.

A variety of remedial measures may be required by these federal court decisions. In order that both members of the bargaining unit and local management may be made aware of what the courts have required, we cite below some remedial measures which may be implemented through

mutual agreement if necessary to assure continued compliance with the Acts.

Special Interdepartmental Transfer Opportunities

Where female and minority employees have been concentrated into certain departments by reason of hiring procedures, steps must be taken to eliminate any existing "lock in" effect as defined by federal judicial decisions arising under the Civil Rights Acts. An appropriate technique for remedying such situations is to provide an opportunity for employees to transfer out of such departments on the basis of plant seniority and proper ability criteria, provided that such transferring employees are afforded the opportunity to carry their seniority to their new departments so that they are able to reach job classifications in their new departments which are generally commensurate with their prior service.

In such cases employees should not be deterred from exercising a special interdepartmental transfer opportunity because the wage rate paid in the job classification they would enter in the new department is lower than the wage rate for the job classification from which they would transfer. The solution to this problem is to develop rate retention procedures which can be used to remedy or avoid such situations.

Job Vacancy Filling in the New Department

Procedures must be negotiated which will provide female and minority employees exercising a special interdepartmental transfer opportunity with the plant and departmental seniority necessary to place them in a proper relationship to employees already in the new department for such matters as bidding, recall, layoff, and demotion rights. If any existing line of progression does not satisfy this requirement, it would have to be restructured.

New Bargaining Unit Employees

Methods by which new employees are assigned in the bargaining unit must be reviewed with respect to their effect upon employment opportunities and, where necessary, must be revised so as to effectuate the purposes of this supplemental agreement.

Trade, Craft and Assigned Maintenance Classifications

It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:

Bay Minette Works
Belpre Works
Chalmette Works
Dolton Works
Gramercy Works
Halethorpe Works
Mead Works
Newark Works
Norco Works
Ravenswood Works
Spokane (Culvert) Works
Tacoma Works
Toledo Works
Trentwood Works
Vancouver Works

As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates. Additional goals will be set for the utilization of female employees in Trade, Craft and Assigned Maintenance classifications.

The committee provided below is empowered to revise both the goals and methods if this is found necessary.

The term "minority" as used herein shall be as defined in EEOC reporting requirements.

Implementation by Joint Committee

A Joint Committee shall be established by the International Union and the Company with authority to make the necessary revisions to accomplish the above stated provisions no later than September 15, 1974. Such Joint Committee shall also provide for appropriate implementing procedures and personnel. The possible courses of remedial action set forth above are illustrative of those available to the Joint Committee. The Joint Committee may adopt additional courses of remedial action or modify those illustrated. Questions concerning interpretation of this supplemental agreement may be referred to the Joint Committee by the parties.

JOINT EXHIBIT #2: COPY OF MEMORANDUM OF UNDERSTANDING

In compliance with Article 9, Supplemental Agreement of the Master Labor Agreement, the Joint Implementation Committee has met to resolve possible inconsistencies with Government and judicial decisions.

It is understood that this Agreement does not constitute an admission by the parties of any violation of Title VII of the Civil Rights Act or Executive Order 11246 and is entered into voluntarily in order to:

1. Confirm the parties' policy and practice of providing equal employment opportunity for all persons without regard to race, color, religion, sex, age, or national origin.
2. Affirm that it is, has been, and will be the policy and the commitment of the parties to fully comply with both the letter and the spirit of Title VII of the Civil Rights Act and Executive Order 11246.

Special Interdepartmental Transfer Opportunities

As agreed to in the 1974 Master Aluminum and Can and Container Labor Agreements, the Joint Company-Union Implementation Committee has reviewed and/or visited all of the plant sites covered by said Agreements with respect to the impact, if any, that past or present job placement and/or seniority practices might have on the minority and female employees in the respective bargaining units. As a result of this study, the Joint Committee has concluded that there presently exists two plants with an alleged affected class of female employees.

The Joint Committee further agreed that, although there is evidence reflecting that certain changes or practices were effected during the last several years to correct the alleged problems in these locations, in order to assure that there are in fact no lingering effects of any supposed past dis-

crimination and to assure continued compliance in accordance with recent Government decrees and court decisions, the following steps will be implemented by the parties to said Agreements.

TRENTWOOD—CLERICAL & TECHNICAL

I. The following is a list by department of jobs that females have arguably been denied the right to bid upon for various reasons.

Shipping and Traffic Department

Shift Leader, Job Class 12
Shipping Coordinator, Job Class 10

Mill Customer Service

Special Fabricating Controller, Job Class 11
Mill Loading Controller, Job Class 11
Metal Coordinator, Job Class 11
Planning Dispatcher, Job Class 7

General Services

Multigraph Operator, Job Class 4
Mail Room Messenger, Job Class 2

Physical Testing Lab

Senior Machine Operator, Job Class 7
Special Metallographic Analyst, Job Class 7
Metal Finishing Technician, Job Class 7
Special Machine Operator, Job Class 6

Cost Time Office

Cost Time Clerk Leader, Job Class 5

Maintenance Planning

Maintenance Area Planner, Job Class 12

II. In order to accomplish, as quickly as possible, the aforementioned objectives, the Joint Implementation Committee has agreed to the following procedures to allow the females listed on Addendum A in the Trentwood C & T unit the opportunity to, upon their own volition, move into the enumerated positions which opportunity was arguably denied them in the past.

1. The date of entry into the C & T unit (hereinafter known as C & T unit seniority) shall be used for all purposes instead of the line of progression, and department seniority presently in use.

2. The change to C & T unit seniority shall not change the relative positions of any employee within a department or line of progression. In other words, there shall be no "bumping" as a result of the change to C & T unit seniority.

3. All future promotions, demotions, layoffs, recalls, and other practices in which seniority is used shall be in accordance with C & T unit seniority. The existing lines of progression shall be maintained.

4. Females may exercise their C & T unit seniority to bid into any of the jobs listed in Section I, when there is a permanent vacancy. The females will compete for the listed job on the basis of C & T unit seniority with all other females (regardless of what department they are presently in) as well as with those employees presently in the job from which the vacancy would normally be filled. Such *preferential bidding* for the females may be accomplished only under the following conditions:

   A. The vacancy must be of an equal or higher job class than the employee's present job class.

   B. Once such a bid, as has been described in paragraph 4 above has been effectuated, all future bids by that female in that line of progression

and department would be governed by C & T unit seniority, and she will have exhausted her *preferential bid rights.*

C. Should a female, after exercising her *preferential right to bid,* be disqualified or disqualify herself during the trial period, she shall return to her original job and will be allowed to exercise her *preferential bidding rights* one more time.

D. Females who exercise their *preferential bidding rights* will have a 45 day trial period that may be extended upon mutual agreement of the parties.

E. Females will receive the same training and trial period if demoted as they would have received had they bid to the job.

F. Should any female elect not to bid on any permanent vacancy listed in Section I that is equal to or higher than her present job grade, she shall have waived any future *preferential rights to bid* permanent vacancies in that particular job.

G. Each female will designate any departments that she would not desire to utilize her *preferential bidding rights* and sign the appropriate waiver with copies to the Local Union President, Staff Representative, and Chairman of the Joint Implementation Committee.

RAVENSWOOD

In order to accomplish, as quickly as possible, the aforementioned objectives, as outlined on page 1 of this Agreement, the Joint Implementation Committee has agreed to the following procedures to allow the females in the Ravenswood Technical Department, as listed on Addendum B, the

opportunity to, upon their own volition, move into the positions which opportunity was arguably denied them in the past.

1. The females in the Technical Department may exercise their plant seniority to bid into any permanent vacancy, except the operator job where operator/assistant operator relationships exist, in any department. They will compete for the job on the basis of plant seniority with all other females in the Technical Department, as well as those employees presently in the department from which the vacancy would normally be filled. Such *preferential bidding* for the females in the Technical Department may be accomplished only under the following conditions:

   A. The job vacancy must be of an equal or higher job class than the employee's present job class and once such a bid has been effectuated, any future bid would be governed by the present plant seniority system.

   B. Females in the Technical Department who exercise their *preferential bidding rights* will have a 45 day trial period that may be extended upon mutual agreement of the parties.

   C. Should a female in the Technical Department, after exercising her *preferential bidding rights,* be disqualified or disqualify herself during the trial period, she shall return to her original job and will be allowed to exercise her *preferential bidding rights* one more time.

   D. Should any female in the Technical Department elect not to bid on any permanent vacancy in another department that is equal to or higher than her present job class, she shall waive any future *preferential rights* to bid permanent vacancies in that job.

E. Each female in the Technical Department will designate any departments that she would not desire to utilize her *preferential bidding rights* and sign the appropriate waiver.

As a result of this Agreement, Trentwood Clerical & Technical and Ravenswood must establish local plant implementation committees. These committees shall consist of the Union President, the Chairman of the Grievance Committee, a representative of the International Union, and one female listed in Addendum A or B designated by the Local Union President and/or representative of the International Union, and the Industrial Relations Superintendent, the Assistant Industrial Relations Superintendent, or Supervisor of Labor Relations, the Works Manager or designee, and an exempt female for the Company.

In doing such, the plant committees will develop programs to insure that all females as identified on Addendums A and B are made fully aware of the rights, provided for them by this Agreement.

The Plant Implementation Committees will report in writing prior to February 7, 1975 to the Chairmen of the Joint Implementation Committee or their designee on their plan to execute this Agreement. Once the Local Plant Committee reports and the Joint Implementation Committee *approves* such plan, the program must be implemented within 30 days.

Trade, Craft, and Assigned Maintenance Classifications

As agreed to in the 1974 Master Aluminum and Can and Container Labor Agreements negotiations, the Joint Company-Union Implementation Committee has reviewed all of the existing Trade, Craft, and Assigned Maintenance classifications with respect to their representation of minority and female employees. Said review has determined that, notwithstanding the efforts made by the Company and the

Union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions. Consequently, based upon the aforementioned conclusion the parties have agreed to the implementation of the following steps to achieve their desired objective.

1. As Trade, Craft, and Assigned Maintenance Jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority or female employee will enter for every non-minority employee entering, including, if necessary, off the street hires, until the goal is reached unless at a particular time there are insufficient available qualified minority and/or female candidates.

2. Using recent Federal Court Guidelines, the Trade, Craft, and Assigned Maintenance classifications have been grouped into families as per the attached Exhibit "A". The percentage representation of minorities that must be represented in each "craft family" for each plant is also attached as Exhibit "B". The percentage of females represented in each craft family will be 5%. This represents the parties' best estimate of the initial goals to be achieved, recognizing that these goals may change as future court/Government decisions are rendered.

3. As on-the-job training and/or apprentice programs are established, each training class entering will be filled on a 50-50 basis. Employees in each training class shall be selected on the basis of the existing practice in each plant, however, 50% of the training class will be composed of only minority and/or female employees, including, if necessary, off the street hires.

4. Once a minority or female employee completes a training program, his or her seniority shall conform to local plant practices.

5. Should there be a reduction in force of those in training programs, normal plant seniority practices will be maintained except that no more than 50% of those laid off in each training class will be minority or female.

The program set forth above should insure the continued compliance by the Company and the Union with the ever-changing status of the law in this area. The Company and Union representative for each plant will meet and jointly report, in writing, to the Chairmen of the Joint Implementation Committee or their designee by February 7, 1975 of their compliance with this Agreement.

Miscellaneous Transfer Opportunities

As agreed to in the 1974 Master Aluminum and Can and Container Labor Agreements negotiations, the Joint Company-Union Implementation Committee has reviewed all existing seniority practices with respect to their impact on minority and female employees. Consequently, based on the review by the parties, it has been agreed to implement the following steps to achieve the desired objectives.

1. At all plants, permanent vacancies in Trade, Craft, Assigned Maintenance, and Special Qualifications Jobs must be bid plant-wide before hiring from the outside.

2. At all plants, employees who are subject to a reduction in force, may exercise their plant seniority to "bump" an employee, who has less plant seniority and who is in the plant labor pool, or plant entry job where a plant labor pool does not exist, as outlined in Article 9 of the Master Aluminum and Can and Container Agreements.

3. Should Government-required hiring goals conflict with inter-plant job opportunities in Article 9 of the Master Labor Agreements, discussions will commence immediately between representatives of the Company and International Union as provided for in Article 9, Section N, paragraph 8.a.

The program set forth above should insure the continued compliance by the Company and the Union with the ever-changing status of the law in this area. The Company and Union representative for each plant will meet and jointly report, in writing, to the Chairmen of the Joint Implementation Committee or their designee by February 7, 1975 of their plan to execute this Agreement. Once the Plant Committee reports and the Joint Implementation Committee *approves* such plan, the program must be implemented within 30 days.

UNITED STEELWORKERS OF AMERICA
(Signatures are illegible)

KAISER ALUMINUM & CHEMICAL CORPORATION

(Signatures are illegible)

ADDENDUM "A"

TRENTWOOD C&T FEMALES
November 8, 1974

Badge No.	Name	Unit Seniority
1073	L. M. Matteson	8-5-46
1568	L. L. Shaw	8-12-46
1855	O. Schadewitz	8-26-46
2129	I. Hoidal	9-9-46
3648	V. F. Amundson	1-27-47
4517	D. Twohy	10-14-47
4578	R. M. Coffman	12-8-47
6549	F. S. Kleven	1-26-50
6893	J. H. Wilson	5-17-50
7295	M. L. Lewsi	9-18-50
7414	B. K. Morgan	1-9-51
8213	B. J. Martin	8-6-51
8235	D. J. McIntyre	11-5-51
8261	D. W. Mowrey	2-18-52
8271	B. M. Howe	3-10-52
8280	E. M. Willis	3-24-52
8903	C. M. Wozny	6-19-52
9074	M. L. Weis	11-12-52
9674	V. J. Mantese	4-20-53
10453	K. McMahon	4-12-54
10461	L. M. Trowbridge	5-3-54
10768	K. M. Williams	8-31-54
11513	D. O. Selzler	6-23-55
11809	B. I. Robertson	7-25-55
11571	E. A. Fleenor	8-11-55
11927	D. E. Lindblad	9-20-55
11876	A. E. Erickson	11-28-55
12072	M. L. Elliott	1-23-56
10469	P. R. Trunnels	3-13-56
12444	P. A. Schauer	4-16-56
12538	D. A. Pearson	5-22-56

Badge No.	Name	Unit Seniority
12749	M. E. Dodge	8-8-56
12784	C. M. Asher	8-27-56
13054	R. L. Grant	1-3-57
13058	D. G. Hoerner	1-14-57
13036	P. J. Thompson	3-14-57
13106	D. E. Anderson	5-27-57
7096	M. J. Weitze	6-5-57
9011	J. M. Falmo	8-6-58
296	E. S. Crane	6-16-61
1276	E. M. Walls	6-16-61
2709	J. C. Casey	6-16-61
3379	V. D. Welch	6-16-61
6433	B. C. Barron	6-16-61
6520	M. E. Lafferty	6-16-61
8246	A. C. Wallin	6-16-61
8248	C. L. Muncy	6-16-61
8273	B. I. Holcomb	6-16-61
8435	L. B. George	6-16-61
8630	D. L. Jimeson	6-16-61
9080	M. J. Scarpelli	6-16-61
9720	D. J. Holman	6-16-61
10810	M. E. Conger	6-16-61
11881	P. C. Hainline	6-16-61
12461	S. L. Coombs	6-16-61
12476	F. L. Roberts	6-16-61
12484	S. F. White	6-16-61
13086	B. L. Guindon	6-16-61
6815	H. P. Evans	5-23-62
4312	D. C. Rosenau	6-27-62
5970	C. E. Clift	1-24-63
7907	J. E. Lindholm	3-2-64
13297	R. E. Francis	3-2-64
13549	P. A. Nehrhood	3-2-64
13692	M. A. Fruin	4-22-64
13742	M. I. Wade	5-12-64

Badge No.	Name	Unit Seniority
13763	J. E. Brynildson	5-18-64
13038	J. A. Dillon	5-21-64
13935	A. M. Harris	5-18-65
14041	D. A. Anderson	7-2-65
14091	V. J. Ruggles	7-19-65
14103	J. M. Hanks	8-23-65
14571	K. N. Heidenreich	5-27-66
14664	D. L. Strait	6-13-66
14666	B. J. Taylor	6-13-66
14761	J. M. Hooper	8-8-66
14973	M. A. Lacaff	7-31-67
15183	P. W. Iverson	4-11-68
15408	F. J. Vannurden	5-13-68
15427	E. R. Van Slate	5-20-68
15461	B. J. Kane	5-27-68
15561	R. J. Triplett	7-8-68
15662	M. E. Robinson	2-10-69
15666	P. E. Lankford	3-31-69
15682	J. A. Kuntz	6-23-69
15765	J. M. Johnson	7-28-70
15766	N. A. Pickett	8-10-70
15826	D. E. Anderson	7-6-71
15827	M. V. Draper	7-6-71
16006	M. Stuart	6-19-72
16041	K. D. Larson	7-31-72
16055	D. M. Rush	8-8-72
15996	S. R. Perrenoud	9-26-72
16225	J. M. Ferryman	10-16-72
16362	J. L. Patterson	2-21-73
16408	L. M. Johnson	3-19-73
13764	S. A. Trapp	4-2-73
16454	K. M. Norman	4-2-73
16475	J. M. Smith	4-9-73
16537	V. L. Charbonneau	5-7-73
16554	M. E. Mitchell	5-21-73

Badge No.	Name	Unit Seniority
16555	J. C. Abrahamson	5-21-73
16620	L. M. Mort	6-20-73
16670	L. Hill	7-9-73
16260	G. J. Wayman	2-22-74
16938	S. R. Fowlkes	3-5-74
16942	J. L. Branda	4-3-74
16151	J. L. Babin	4-15-74
16347	P. A. Barr	4-15-74
16973	T. R. Jamme	4-23-74
16978	K. E. Landry	4-29-74
16980	T. E. Barner	5-6-74
16992	J. M. Cerna	5-20-74
17007	L. L. Griego	5-30-74
16016	D. J. Kilmartin	7-1-74
17047	V. L. Morse	7-22-74
17068	C. J. Quist	7-25-74
17110	T. I. Reichert	8-19-74

All employees with unit seniority date of 6-16-61 use this date for the purpose of bidding jobs within the plant, except those within the Physical Testing and Chem Labs. The list below shows the seniority dates these employees use when bidding within the Physical Testing and Chem Labs, as well as for benefits provided by the labor agreement.

296	E. S. Crane	6-27-46
1137	B. A. Couch	7-22-46
1276	E. M. Walls	7-29-46
2709	J. C. Casey	10-9-46
3379	V. D. Welch	11-25-46
6433	B. C. Barron	12-20-49
6520	M. E. Lafferty	12-29-49
8246	A. C. Wallin	12-26-51

Badge No.	Name	Unit Seniority
8248	C. L. Muncy	1-7-52
8273	B. I. Holcomb	3-14-52
8630	D. L. Jimeson	5-28-52
9080	M. J. Scarpelli	12-11-52
9720	D. J. Holman	4-27-53
10810	M. E. Conger	9-22-54
8435	L. B. George	7-1-55
11881	P. C. Hainline	8-16-55
12461	S. L. Coombs	4-9-56
12476	F. L. Roberts	4-16-56
12484	S. F. White	4-21-56
13086	B. L. Guindon	4-4-57

ADDENDUM "B"

RAVENSWOOD TECHNICAL DEPARTMENT FEMALES
November 8, 1974

Badge No.	Name	Plant Seniority
750	J. J. Hackney	3-5-57
1570	A. M. Brotherton	3-24-58
1998	E. C. Hart	7-28-58
2808	M. M. Skeens	5-18-59
3257	B. I. Simpkins	4-26-60
3963	C. M. Baltic	5-6-63
1909	G. M. Mealey	6-23-58
1017	L. M. Stethem	5-6-67
1103	J. Bailengee	7-2-57
1786	S. E. Neigler	5-14-58
2893	B. L. Mays	6-16-59
542	O. M. Priddy	2-4-57
1456	H. H. Brammer	1-2-58
1884	J. C. Cowan	6-11-58
2252	G. Y. Windle	9-10-58
2290	D. J. Roush	9-15-58
2481	R. A. Boyd	10-15-58
1775	D. F. Elicker	5-12-58

Exhibit "A"

The following is the grouping of KACC job families to comply with Federal Court Guidelines.

I

Hydraulic Specialist
Maintenance Mechanic
Pipe Fitter
Scale Repairer (Mechanical)
Refrigeration Specialist
General Repairer/ Mechanical

II

Repairer—Bench & Floor
Layout Maker

III

Bricklayer
Insulator
Painter
Sign Painter (Illustrator)
Welder
Garage Mechanic
Blacksmith
Carpenter
Mechanic—Heavy Mobile Equipment Operator
Diesel Mechanic

IV

Die Maker
Machinist
Toolmaker

V

Works Repairer
Works Repairer/Electronics
Electrician
Instrument Repairer
Meter & Relay Specialist or Electronic Repairer
General Repairer/Electrical
General Repairer—Mechanical/Electrical
Air Conditioning Specialist (Electrical)
Electric Truck Repairer
Scale—Printer Repairer (Electronics)

VI

Rigger
Sheet Metal Worker
Boilermaker

Trentwood C & T

Draftperson
Accountant
Computer Operator

Exhibit "B"

Percentage Representation In Each Craft Family

Plant	Minority
Bay Minette	16
Belpre	6
Chalmette	27
Dolton	17
Gramercy	39
Halethorpe	27
Houston	25
Jacksonville	21
L. A. Container	23
Edison	21
Mead	3
Newark	3
Norco	39
Ravenswood	1
Trentwood—P & M	3
Trentwood—C & T	3
Spokane Culvert	3
Toledo	10
Vancouver	5
Tacoma	6

JOINT EXHIBIT #3: BID LISTS ON EACH OF THE 6 TRAINING PROGRAMS

Posted for Bidding April 3, 1974

BIDDERS FOR *GENERAL REPAIRMEN* (Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Kesey, B.	2012	C	Physical limitations	4.655
Chapman, A.	2086	C	Declined the offer	5.306
Johnson, W.	2100	N	Declined the offer	5.957
Boudreaux, A.	2137	C	Disqualified	5.864
Picou, R.	2228	C	Selected for the program	5.678
Becnel, M.	2224	C	Selected for the program	5.957
Ocmand, G. A.	2249	C	Not enough seniority for the White %	5.585
Guidry, A.	2264	C	Ditto	4.655
Faucheux, E.	2406	C	"	5.585
Constant, P.	2460	C	"	4.562
Maurin, F. H.	2479	C	"	5.585
Cristina, V.	2485	C	"	5.864
Haydel, O. J.	2505	C	"	5.864
Small, M.	2542	C	"	5.120
Roussel, P.	2585	C	"	5.957
Kliebert, A. J.	2587	C	"	5.399
Oubre, J.	2593	C	"	5.864
Louque, P.	2647	C	"	5.492
Deroche, S. J.	2658	C	"	4.934
Poirrier, E.	2668	C	"	5.120
Luhe, L.	2671	C	"	5.655
Foret, K.	2694	C	"	5.306
Cambre, G.	2718	C	"	5.306
Traveler, W.	2722	N	Selected for the program	5.957
Keller, D.	2729	C	Not enough seniority for the White %	5.306
Rizzuto, J.	2730	C	Ditto	6.515
LeBlanc, J.	2740	C	"	5.306
Parrino, F. J.	2746	C	"	4.655
Duhe, M. P.	2749	C	"	4.655
Forsythe, W.	2760	C	"	5.399
Bergeron, L.	2783	C	"	5.306
Oswald, C.	2809	C	"	5.678
Guidry, G.	2847	C	"	5.678
Roussel, L.	2919	C	"	5.399
Monica, J.	2928	C	"	5.492

GENERAL REPAIRMEN *(Con't.)*

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Bourgeois, J.	2933	C	"	5.120
Duhe, V.	3001	C	"	5.492
LeBlanc, B.	3026	C	"	5.678
Stewart, J.	3030	N	Declined the offer	5.306
Bourgeois, G.	3037	C	Not enough seniority for White %	5.306
Cox, J.	3045	C	Ditto	5.957
Carter, R.	3046	N	Declined the offer	4.934
Breaud, K.	3048	C	Not enough seniority for White %	5.306
Weber, B.	3042	C	Ditto	5.678
Beadle, H.	3061	C	"	5.306
Belvin, N.	3062	N	Selected for the program	5.399
Jasmin, J.	3063	N	Selected for the program	5.492
Andermann, F.	3071	C	Not enough seniority for the White %	5.306
Gautreau, C.	3081	C	Ditto	5.399
Dennis, C.	3089	N	Not enough seniority for the Black %	5.399
Faucheux, V.	3093	C	Not enough seniority for the White %	5.678
Jacob, O.	3103	C	Ditto	5.213
Vicknair, H.	3152	C	"	5.306
Bordelon, V.	3154	C	"	5.306
Lowry, M.	3176	C	"	5.306
Malbrough, B.	3186	C	"	5.585
Whitney, P.	3244	C	"	5.585
Mitchell, R.	3247	N	Not enough seniority for the Black %	6.515
Roussel, M.	3249	C	Not enough seniority for the White %	4.655
Zeringue, P.	3251	C	Ditto	4.655
Deroche, G.	3255	C	"	5.585
Boudreaux, D.	3261	C	"	5.585
Toups, C. J.	3264	C	"	4.562
Roussel, D.	3267	C	"	4.562
Narcisse, F.	3270	N	Not enough seniority for the Black %	4.562
Melancon, D.	3287	C	Not enough seniority for the White %	4.562
Alexis, W.	3288	C	Ditto	4.655
Louque, M.	3292	C	"	4.562
Forsythe, L.	3314	C	"	4.655
Bourgeois, Jr. R.	3315	C	"	4.655
Troxclair, W.	3345	C	"	4.562

Posted for Bidding April 3, 1974

BIDDERS FOR *ELECTRICIAN* (Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Kesey, B.	2012	C	Physical limitation	5.492
St. Pierre, A.	2028	C	Declined the offer	5.771
Chapman, A.	2086	C	Selected for the program, Instrument Repair	5.306
Rome, Jean P.	2162	C	Selected for the program	5.120
Picou, R.	2228	C	Not enough seniority for the White %	5.678
Guidry, A.	2264	C	Ditto	4.655
Bourgeois, G.	2279	C	"	5.678
Faucheux, E.	2406	C	"	6.143
Constant, P.	2460	C	"	4.562
Maurin, F. H.	2479	C	"	5.585
Cristina, V.	2485	C	"	5.864
Montz, I.	2530	C	"	6.014
Small, M.	2542	C	"	5.120
Roussel, P.	2585	C	"	5.957
Kliebert, A. J.	2587	C	"	5.399
Oubre, J.	2593	C	"	5.864
Deroche, S. J.	2658	C	"	4.934
Poirrier, E.	2668	C	"	5.120
Duhe, L.	2671	C	"	4.655
Foret, K.	2694	C	"	5.306
Bergeron, J.	2701	C	"	5.306
Cembre, G.	2718	C	"	5.306
Triche, R.	2721	C	"	5.306
Keller, D.	2729	C	"	5.306
Parrino, F. J.	2746	C	"	4.655
Duhe, M. P.	2947	C	"	4.655
Bergeron, L.	2783	C	"	5.306
Guidry, G.	2847	C	"	5.678
St. Pierre, A.	2863	C	"	5.213
Roussel, L.	2919	C	"	5.399
Bourgeois, J.	2933	C	"	5.120
Nailor, J.	2979	N	Selected for the program	5.306
Farlough, J.	2981	N	Not enough seniority for the Black %	5.678
LeBlanc, B.	3026	C	Not enough seniority for the White %	5.678

ELECTRICIAN (Con't.)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Stewart, J.	3030	N	Not enough seniority for the Black %	5.306
Bourgeois, G.	3037	C	Not enough seniority for the White %	5.306
Weber, B.	3042	C	Ditto	5.678
Cox, J.	3045	C	"	5.957
Carter, R.	3046	N	Not enough seniority for the Black %	4.934
Breaud, K.	3048	C	Not enough seniority for the White %	5.306
Brenn, A.	3049	C	Ditto	5.678
Beadle, H.	3061	C	"	5.306
Belvin, N.	3062	N	Not enough seniority for the Black %	5.399
Andermann, F.	3071	C	Not enough seniority for the White %	5.306
Dennis, C.	3089	N	Not enough seniority for the Black %	5.399
Faucheux, V.	3093	C	Not enough seniority for the White %	5.678
Bordelon, V.	3154	C	Ditto	5.306
Lowry, M.	3176	C	Not enough seniority for the White %	5.306
Malbrough, B.	3186	C	Ditto	5.585
Whitney, P.	3244	C	"	5.585
Roussel, M.	3249	C	"	4.655
Zeringue, P.	3251	C	"	4.655
Toups, C. J.	3264	C	"	4.562
Roussel, D.	4367	C	"	4.562

Posted for Bidding April 3, 1974

BIDDERS FOR *INSTRUMENT REPAIRERS* (Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Kesey, B.	2012	C	Physical limitation	4.655
St. Pierre, A.	2028	C	Refused	5.771
Gendrea, R.	2055	C	Refused	5.585
Chapman, A.	2086	C	Successful transfer	5.306
Johnson, W.	2100	N	Refused	5.957
Mitchell, R.	2109	C	Not enough seniority for white %	5.492
Rome, J.	2162	C	Ditto	5.120
Becnel, M.	2244	C	"	5.957
Picou, R.	2228	C	"	5.678
Guidry, A.	2264	C	"	4.655
Faucheux, E.	2406	C	"	5.585
Constant, P.	2460	C	"	4.562
Maurin, F.	2479	C	"	5.585
Christina, V.	2485	C	"	5.864
Small, M.	2542	C	"	5.120
Roussel, P.	2585	C	"	5.957
Kliebert, A. J.	2587	C	"	5.399
Oubre, J.	2593	C	"	5.864
Deroche, Jr. S.	2658	C	"	4.942
Poirrier, E.	2668	C	"	5.120
Duhe, L.	2671	C	"	5.655
Foret, K.	2694	C	"	5.306
Williamson, C.	2714	C	"	5.607
Cambre, G.	2718	C	"	5.306
Triche, R.	2721	C	"	5.132
Keller, D.	2729	C	"	5.306
Garon, R.	2744	C	"	4.562
Parrino, F.	2746	C	"	4.655
Duhe, M.	2749	C	"	4.655
Forsythe, W.	2760	C	"	5.399
Bergeron, L.	2783	C	"	5.306
Guidry, G.	2847	C	"	5.678
St. Pierre, A.	2863	C	"	5.227
Roussel, L.	2919	C	"	5.399
Monica, J.	2928	C	"	5.492
Bourgeois, J.	2933	C	"	5.120

INSTRUMENT REPAIRERS *(Con't.)*

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Nailor, J.	2979	N	Entered Electrical Training Program	5.306
Goudia, N.	2985	N	Successful transfer	5.678
LeBlanc, B.	3026	C	Not enough seniority for white %	5.678
Triplett, L.	3027	N	Not enough seniority for black %	5.678
Stewart, J.	3030	N	Ditto	5.306
Bourgeois, J.	3037	C	Not enough seniority for white %	5.306
Weber, B.	3042	C	Ditto	5.678
Cox, J. L.	3045	C	"	5.957
Carter, R.	3046	N	Not enough seniority for black %	4.934
Breaud, K.	3048	C	Not enough seniority for white %	5.306
Brenn, A.	3049	C	Ditto	5.678
Belvin, N.	3062	N	Not enough seniority for black %	5.399
Andermann, F.	3071	C	Not enough seniority for white %	5.306
Gauthreaux, C.	3081	C	Ditto	5.399
Dennis, C.	3089	N	Not enough seniority for black %	5.399

Posted for Bidding May 7, 1974

BIDDERS FOR *AIR CONDITIONING MECHANIC*

(Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Chapman, A.	2086	C	Declined the offer	5.306
Mitchell, R.	2109	C	Ditto	5.492
Keller, P.	2258	C	"	5.492
Bourgeois, G.	2279	C	Selected for the program	5.678
Faucheux, E.	2406	C	Not enough seniority for the White %	6.143
Maurin, F. H.	2479	C	Ditto	4.655
Poche, R.	2521	C	"	5.306
Roussel, P.	2585	C	"	5.957
Duhe, L.	2671	C	"	4.655
Cambre, G.	2718	C	"	5.306
Triche, F.	2721	C	"	5.306
Jasmin, A.	2725	N	Not enough seniority for the Black %	5.120
Parrino, F. J.	2746	C	Not enough seniority for the White %	4.655
Guidry, G.	2847	C	Ditto	5.771
Farlough, J.	2981	N	Not enough seniority for the Black %	5.678
Weber, B.	3042	C	Not enough seniority for the White %	5.678
Brenn, A.	3049	C	Ditto	5.678
Boudreaux, D.	3261	C	"	4.655
Toups, C. J.	3264	C	"	4.562
Troxclair, W.	3345	C	"	4.562

Posted for Bidding October 15, 1974

BIDDERS FOR *CARPENTER* (Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Guidry, A.	2264	C	Selected for the program	4.657
Maurin, F. H.	2479	C	Not enough seniority for White %	4.657
Duhe, L. H.	2671	C	Ditto	4.657
Parrino, F. J.	2746	C	"	4.657
Duhe, M.	2749	C	"	4.657
Bergeron, L.	2783	C	"	5.322
Triplett, L.	3027	N	Selected for the program	5.702
Stewart, J.	3030	N	Not enough seniority for Black %	5.322
Breaud, M.	3047	C	Not enough seniority for White %	5.322
Breaud, K.	3048	C	Ditto	5.322
Brenn, A. J.	3049	C	"	5.702
Abadie, A. J.	3069	C	"	5.702
Roger, W.	3074	C	"	4.657
Lemar, L.	3116	N	Not enough seniority for Black %	5.892
Jackson, R.	3190	N	Ditto	5.322
Roussel, M.	3249	C	Not enough seniority for White %	5.892
Toups, C. J.	3264	C	Ditto	5.322
Wiltz, C.	3278	N	Not enough seniority for Black %	5.322
Oubre, R.	3335	N	Ditto	4.942
St. Pierre, H.	3381	C	Not enough seniority for White %	4.562
Oubre, E.	3320	N	Not enough seniority for Black %	4.562

Posted for Bidding October 15, 1974

BIDDERS FOR *INSULATOR* (Listed According to Seniority)

Name	*Badge No.*	*Race*	*Reason Not Selected*	*Rate of Pay*
Mitchell, E.	2017	N	Declined the offer	5.512
Guidry, A.	2264	C	Only one Black employee selected for program	4.657
Maurin, F. H.	2479	C	Ditto	4.657
Duhe, J. W.	2671	C	"	4.657
Triche, R.	2721	C	"	5.322
Parrino, F. J.	2746	C	"	4.657
Bergeron, L.	2783	C	"	5.322
Johnson, R.	2936	N	Declined the offer	4.657
Triplett, L.	3027	N	Selected for the program	5.702
Stewart, J.	3030	C	Not enough seniority for the Black %	5.322
Breaud, M.	3047	C	Not enough seniority for the White %	5.322
Breaud, K.	3048	C	Ditto	5.322
Brenn, A. J.	3049	C	"	5.702
Abadie, A. J.	3069	C	"	5.702
Roger, W.	3074	C	"	4.657
Lemar, L.	3116	N	Not enough seniority for the Black %	5.892
Jackson, R.	3190	N	Ditto	5.322
Roussel, M.	3249	C	Not enough seniority for the White %	5.892
Wiltz, C.	3278	N	Not enough seniority for the Black %	5.322
Oubre, R.	3336	N	Ditto	4.942

KAISER EXHIBIT 1: CRAFT FAMILIES, FEBRUARY, 1975
KAISER GRAMERCY

CRAFT FAMILIES—FEBRUARY 1975
including New Trainees under 1974 Agree.

	Black	*White*	*Total*
GROUP I			
Gen. Repairmen	4	174	178
Air Cond. Rep.	0	5	5
	4	179	183
	(2.19%)		
GROUP III			
Insulator	1	7	8
Carpenter-Painter	5	25	30
Garage	1	8	9
	7	40	47
	(14.89%)		
GROUP IV			
Machinist	0	8	8
	(0%)		
GROUP V			
Electrician	1	31	32
Instr. & Elec. Repair	1	21	22
	2	52	54
	(3.70%)		
CRAFT TOTALS	13[1]	279[2]	292[3]
	(4.45%)		

[1] Includes 7 new trainees under 1974 program.

[2] Includes 6 new trainees under 1974 program.

[3] Includes 13 new trainees under 1974 program.

KAISER EXHIBIT 2: TRAINEES SELECTED, CRAFT TRAINING PROGRAMS, SINCE FEBRUARY 1, 1974, KAISER GRAMERCY PLANT

TRAINEES SELECTED—1974 PROGRAM

	Black	*White*	*Total*
BIDS POSTED APRIL 3, 1974			
Gen. Repairman (Gp. I)	3	2	5
Electrician (Gp. V)	1	1	2
Inst. Repair. (Gp. V)	1	1	2
Total Gp. I To Date	3	2	5
Total Gp. V To Date	2	2	4
Total All Gp. To Date	5	4	9
BID POSTED MAY 7, 1974			
Air Cond. Rep. (Gp. I)	0	1	1
Total Gp. I To Date	3	3	6
Total Gp. V To Date	2	2	4
Total All Gp. To Date	5	5	10
BIDS POSTED OCTOBER 15, 1974			
Carpenter (Gp. III)	1	1	2
Insulator (Gp. III)	1	0	1
Total Gp. I To Date	3	3	6
Total Gp. III To Date	2	1	3
Total Gp. V To Date	2	2	4
Total All Gp. To Date	7	6	13

KAISER EXHIBIT 3: CRAFT EMPLOYEES, KAISER GRAMERCY, 1972-74

GRAMERCY PLANT—CRAFT EMPLOYEES

	1972			1973			1974		
	B	W	Tot.	B	W	Tot.	B	W	Tot.
Gen. Repairmen	0	158	158	0	172	172	4	175	179
Air Cond. Rep.	0	3	3	0	3	3	0	5	5
Insulator	0	6	6	0	7	7	1	7	8
Carp.-Painter	4	25	29	4	25	29	5	25	30
Garage	1	8	9	1	8	9	1	8	9
Machinist	0	7	7	0	8	8	0	8	8
Electrician	0	25	25	0	26	26	1	31	32
Inst. & Elec. Rep.	0	20	20	0	19	19	1	21	22
TOTALS	5	252	257	5	268	273	13	280	293
		1.94%			1.83%			4.43%	

KAISER EXHIBIT 4: REPORT LETTER (WITH ATTACHED CHART) REQUIRED BY MEMORANDUM OF UNDERSTANDING, DEE TO COMPANY AND UNION REPRESENTATIVE, DATED FEBRUARY 6, 1975

KAISER
ALUMINUM

Kaiser Aluminum & Chemical Corporation

February 6, 1975

Mr. Harry Mayfield
Director, District 27, USWA
1330 Market Avenue, North
Canton, Ohio 44714

Mr. Larry Stewart
Vice President, Industrial Relations
Kaiser Aluminum & Chemical Corporation
300 Lakeside Drive
Oakland, California

Gentlemen:

Attached is the information requested during our New Orleans seniority meeting. The Gramercy plant has already implemented a 50-50 training program in six craft classifications; 13 male trainees, of which 7 are black, are currently participating. Our plans are to continue filling craft vacancies on a 50-50 basis through the training program, and when necessary from outside hire.

Training program vacancies will be awarded to white males by seniority on a 50% basis, and to black males and females by seniority on a 50% basis until we reach our percentage goal of 39%. Based upon the female compliment at that time, we will fill in additional vacancies with females until the 5% female goal is reached. This of course assumes that minorities and females are available and will be bidding on future vacancies.

Journeyman vacancies will also be bid on a 50-50 basis within the plant, and outside hires will be obtained on the same basis. Again, this assumes fully qualified black males and females are available.

Under the "Miscellaneous Transfer Opportunities" section, the Gramercy local seniority agreement is in compliance with paragraphs 1 and 2.

Also, in reference to Tom Connor's memo of 1/30/75, Gramercy reports no problems in implementing our plans as described above.

/s/ D. E. ENGLISH
D. E. English
Industrial Relations Superintendent

/s/ PETE ROUSSEL
Pete Roussel
Local 5702 President

Enclosure

GRAMERCY WORKS

CRAFT FAMILIES

GROUP #1

	Minority Male	*Minority Female*	*Caucasian Male*	*Caucasian Female*
General Repairer	4	0	174	0
Air Conditioning Rep.	0	0	5	0
Total	4		179	
Family Percentage	– 2.18%			

GROUP #3

Insulator	1	0	7	0
Carpenter-Painter	5	0	25	0
Garage	1	0	8	0
Total	7		38	
Family Percentage	–18.4 %			

GROUP #4

Machinist	0	0	8	0
Family Percentage	–0			

GROUP #5

Electrician	1	0	31	0
Instrument and Elect. Repairer	1	0	21	0
Total	2		52	
Family Percentage	– 3.70%			

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

No. 74-3510

SECTION "I"

BRIAN F. WEBER, Individually and on Behalf of all other persons similarly situated

VERSUS

KAISER ALUMINUM & CHEMICAL CORPORATION

and

UNITED STEELWORKERS OF AMERICA AFL-CIO

JUDGMENT

This cause came on for trial before this Court on plaintiffs' request for a permanent injunction.

After hearing the evidence, the Court took the matter under submission.

Now, therefore, for the written reasons of the Court on file herein, and considering the direction of the Court as to the entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Brian F. Weber, Individually and on behalf of all other persons similarly situated, and against defendants, Kaiser Aluminum & Chemical Corporation and United Steelworkers of America AFL-CIO, granting a permanent injunction restraining defendants from denying plaintiffs, Brian F. Weber and all other members of the class access to on-the-job training programs on the basis of race.

Dated at New Orleans, Louisiana, this day of June, 1976.

/s/ JACK M. GORDON
Jack M. Gordon
United States District Judge

Michael R. Fontham, Esq.
F. W. Middleton, Jr., Esq.
John C. Falkenberry, Esq.
Jerry L. Gardner, Jr., Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that Kaiser Aluminum & Chemical Corporation, defendant above-named, hereby appeals to the United States Court of Appeals, Fifth Circuit from the final judgment entered in this action on the 23rd day of June, 1976.

July 9, 1976.

By Attorneys,

Mr. Robert J. Allen, Jr.
Legal Department
Kaiser Aluminum & Chemical Corporation
300 Lakeside Drive
Oakland, California 94604

TAYLOR, PORTER, BROOKS & PHILLIPS

/s/ BY: F. W. MIDDLETON, JR.
F. W. Middleton, Jr., Trial Attorney
P. O. Box 2471
Baton Rouge, Louisiana 70821
504/387-3221, Ext. 24

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

(Title Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that defendant, United Steelworkers of America, AFL-CIO, hereby appeals to the United States Court of Appeals for the Fifth Circuit from this Court's order and judgment granting a permanent injunction dated June 21, 1976.

This the 12th day of July, 1976.

COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

/s/ By JOHN C. FALKENBERRY
John C. Falkenberry

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3266

(Title Omitted in Printing)

ORDER

IT IS ORDERED that the motion of the United States of America and the Equal Employment Opportunity Commission for leave to intervene as parties appellant and to enlarge the time to and including December 22, 1977 within which intervenors-appellants may file a petition for rehearing and suggestion for rehearing en banc is GRANTED; provided, that the time for filing petition for rehearing and suggestion for rehearing en banc is extended to January 15, 1978, congruent with the enlargement this day granted other parties herein.

/s/ THOMAS GIBBS GEE
United States Circuit Judge

Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435, 78-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA, *Respondents*

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL.

MEMORANDUM OF UNITED STEELWORKERS OF AMERICA IN OPPOSITION TO REQUEST BY UNITED STATES OF AMERICA, ET AL., IN NO. 78-436, FOR SUMMARY REMAND

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Attorneys for United Steelworkers of America

3 3 PRINTED IN U.S.A.

Nos. 78-432, 78-435, 78-436

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KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL.

MEMORANDUM OF UNITED STEELWORKERS OF AMERICA IN OPPOSITION TO REQUEST BY UNITED STATES OF AMERICA, ET AL., IN NO. 78-436, FOR SUMMARY REMAND

The United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser") and the United States (together with the Equal Employment Opportunity Commission) have each separately petitioned the Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case. The United States in its petition, however, asks that this Court summarily vacate the judgment below

and remand the case "for reconsideration and supplementation of the record . . . ."[1]

In our petition we showed the importance of the issue decided by the court below and the urgency of this Court resolving that issue now. That issue, as phrased by the question presented in our petition, is:

> Does the prohibition against "discrimination" contained in Title VII of the Civil Rights Act of 1964 preclude an employer and union from voluntarily agreeing in collective bargaining to adopt an affirmative action program reserving 50% of the openings in a newly-created in-plant craft training program for black bidders, where there has been no prior discrimination against blacks at that plant but the progam is intended to alleviate one pervasive consequence of historic societal discrimination against blacks: the virtual absence of blacks from craft jobs.

The Government asks this Court to leave that issue unresolved; rather, the Government wishes to secure a remand in the hope that this case can be transformed into one raising different issues *not* presented on the existing record in this case: (1) Whether "Title VII [of the Civil Rights Act of 1964] permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question," U.S. Pet. at 11; and/or (2) whether an "affirmative action program" can be upheld under Title VII where an "'administrative body charged with the responsibility made determinations of past discrimination by the [industry] affected and fashioned [a remedy] deemed appropriate to rectify discrimination.'" *Id.* at 19. The Government acknowledges that neither of these issues is presented on the record in this case, but speculates that

[1] Petition of the United States and EEOC (hereinafter "U.S. Pet.") at 20.

evidence might exist which could be used to recast the case in terms of one or both of these issues. Accordingly, the Government requests a remand to "supplement the record" with new evidence.

We show herein, first, that there is nothing inaccurate, misleading, or incomplete about the present record, on which both courts below proceeded; to the contrary, the existing record accurately and fully reflects the state of facts at the time Kaiser and USWA adopted their affirmative action program, and it reflects as well that the parties adopted that program for reasons other than those which the Government proffers to justify the program.

We then turn to a demonstration that the issues the Government speculates the case might present following remand are different from, but not as the Government contends narrower than, the issue actually raised by the case, and indeed, that the Government's hoped-for issues could be resolved in its favor only by surmounting legal difficulties which are not present in the case as it now stands.

Finally, we establish that it is the issue decided by the courts below and raised by our petition, and not the issues proposed by the Government, that will determine the legality of affirmative action programs which USWA has negotiated throughout the steel, aluminum, and can industries.

I.

A. The evidence in this case is that the affirmative action plan struck down by the courts below was not the product of a determination by Kaiser or USWA that a plaintiff might be able to prove a *prima facie* case of discrimination in hiring for craft jobs at the Gramercy plant. Nor was it a response to a finding by any government agency that such discrimination had occurred—there was no such finding, and the documents lodged by the Government with its petition do not indicate otherwise.

In fact, as the record shows, the quota program for filling craft apprenticeship vacancies at the Gramercy plant was established as part of a nationwide agreement between Kaiser and USWA covering 15 Kaiser plants throughout the United States. Kaiser and USWA entered into that program without making a plant-by-plant assessment of whether a plaintiff might be able to prove a *prima facie* case of discrimination against blacks in entry into craft jobs, and without such an assessment at the Gramercy plant in particular. USWA has entered into similar agreements with each of the other companies in the aluminum industry, with each of the companies in the can industry, with each of the companies in the steel industry (approximately 250 basic steel plants are covered by such agreements),[2] and with numerous other companies in a variety of other industries. In no industry were such agreements predicated upon an attempt by the parties to assess on a plant-by-plant basis the prognosis for suits claiming discrimination against blacks in entry into craft jobs; nor were they predicated upon findings by a government agency that discrimination had occurred at the covered plants.

Moreover, the affirmative action program USWA has negotiated in all of these instances, as exemplified by the program at issue here, is not tailored to benefit those who might have been victims of any discrimination that might have occurred in access to craft jobs at the covered plants. At the Gramercy plant, for example, craftsmen historically were hired "off the street,"[3] for neither blacks nor whites employed in production jobs at the plant were qualified to fill craft jobs. Yet the preferences established by the affirmative action program extend not to blacks who might have been in the craft hiring pool—and thus who might have been victims of discrimination in craft hiring at Kaiser had such discrimination occurred—but only to blacks already

[2] See USWA Pet. at 5 and n. 5.

[3] See USWA Pet. at 4 and n. 3.

employed at the plant in production jobs who lacked the qualifications to have secured craft jobs prior to the institution of the training program.

The affirmative action program USWA negotiated with Kaiser, and with large segments of American industry as described above, was not designed to remedy discrimination that might, or might not, have occurred at the plants where the program was put into effect. Rather, the program was designed to address a phenomenon which troubled the union throughout its jurisdiction: the virtually complete absence of blacks in craft jobs in industrial plants—an absence which contrasts, in many plants, with the presence of large numbers of blacks in production jobs. The reason for that phenomenon may well differ from plant to plant. The explanation for it at the Gramercy plant, as found by both courts below, is undoubtedly common: the pool of qualified craftsmen in the job market from which the plant could draw was almost exclusively white.

B. The Government suggests in its petition that a purpose of a remand would be to "permit one of the parties or an intervenor to seek to prove prior discrimination against blacks at the Gramercy plant." U.S. Pet. at 19.[4] Both courts below found that Kaiser had not discriminated against blacks in filling craft jobs at the Gramercy plant, and those findings were based on a full record which contains *inter alia:* the numbers of black and white craftsmen; the procedures the company used for filling craft vacancies; and the characteristics of the available pool from which craftsmen at the Gramercy plant were hired.

The Government makes no proffer as to ways in which

[4] That suggestion appears at odds with the statement earlier in the Government's petition that "it is unduly restrictive to permit the employer and union to adopt an affirmative remedy only if they can establish in court that the employer has been guilty of discrimination." U.S. Pet. at 11.

the record in this case is inadequate, or as to any specific evidence of discrimination which might be introduced, except to speculate that perhaps the same kinds of hiring criteria found to be suspect by the court in *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978) —an opinion involving another Kaiser plant, which expressly recognized that the circumstances at that plant were different from those at the plant involved in *this* case, *id.* at 1390-91, n. 35—could be shown to have been used at the Gramercy plant. Even that speculation is disingenuous. As the record shows, the craft positions at the Gramercy plant required journeyman craft skills; without a training program, the craftsmen hired off the street had to possess those skills; and, in the hiring area of the Gramercy plant, blacks constituted approximately one or two per cent of the pool of qualified journeyman craftsmen. Thus, the obstacle to blacks receiving crafts jobs prior to the institution of the present program was not some arbitrary general intelligence or high school education requirement imposed by Kaiser, as was found to be the case in *Parson*, but the inability of blacks to achieve journeyman skills due to societal discrimination. The only way *that* obstacle could have been removed by Kaiser was to establish, as the plan struck down by the court below does, a training program which teaches those skills over a two or three year period. That program, as the record shows, costs between $15,000 and $20,000 per year per trainee.

These facts were all before the courts below, which found not only that Kaiser had not discriminated against blacks in filling craft vacancies but that over the years Kaiser had made special efforts to attract black craftsmen to the Gramercy plant.[5]

---

[5] As we noted in our petition, at 3-4, n. 2, USWA argued below that the record facts permitted a finding that Kaiser had discriminated, but the courts below rejected that claim.

II.

The Government's petition asserts that the remand it seeks "could significantly narrow the question presented in this case." U.S. Pet. at 20. As we showed in Part I, there is no evidence absent from this record which could transform the question presented. But even if such evidence could be found, it would not be accurate to say that the issue would be "narrowed." For what the Government hopes to create by a remand is not a lesser included issue encompassed in the question now presented, but an entirely different issue. The question now presented is whether private parties may *voluntarily* establish programs such as that here. If the Government could reconstruct the case on remand, the issue would become whether Title VII empowers or permits the Government to *impose* such programs upon private parties. Both of the theories the Government wishes to recast this case to present are bottomed on the following premise: the Government has the power to require private parties who have discriminated in the past to employ a quota as a "remedy," even though that quota advantages blacks, solely because of their race, who are not themselves the victims of the discrimination the quota is meant to "remedy."

The Government's first theory proceeds from that premise in the following way: courts may upon finding discrimination in violation of Title VII order quota "remedies"; Title VII favors voluntary compliance; therefore, private parties ought to be able to avoid litigation by voluntarily putting into place the kinds of remedies courts would order —in those instances where the private parties can establish that there was some predicate for a court to act.[6]

---

[6] Thus, the Government argues:

"... Faced with possible violations of Title VII, Kaiser could have refused to take corrective action and instead have allocated its resources to defend itself in litigation. Had Kaiser

The Government's second theory builds upon that premise more directly: the Office of Federal Contract Compliance ("OFCC") has the power to require an employer that contracts with the Government to adopt a quota program, and such power does not conflict with Title VII.

Resolution of the issue whether the Government may impose quota remedies upon nonconsenting private parties requires resolution of knotty questions not implicated by the issue which is properly here. The Government's assumption, for example, that once a court in a Title VII case finds discrimination of some sort, it may then award a remedy directed not at making-whole a victim of that discrimination but instead at providing a benefit to a non-victim—because that non-victim is the same race as the actual victim—is by no means obviously correct. What Title VII forbids is discrimination "against any individual." 42 U.S.C. § 2000e-2(a)-(d). That proscription does not lead inevitably to the conclusion that a finding of discrimination against one individual or class of individuals empowers a court to order that a benefit be given to another individual or class of individuals. This Court has indeed twice prescribed, as the appropriate cure for a Title VII violation, that the individual victims of discrimination be put in their "rightful place." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 737 (1976); *Teamsters* v. *United States*, 431 U.S. 342, 362-376 (1977). And all of the opinions in *Franks* suggested that

chosen that course, and had its defense proved unsuccessful, a court could have imposed the kind of affirmative action program here at issue as a remedy for discrimination, as the court of appeals acknowledged (App. A., *infra*, p. 10a). Even without a finding or admission of discrimination, the same program could have been incorporated into a consent decree in settlement of the litigation, as the court of appeals also acknowledged (*id.* at 16a). Instead, however, the program was instituted voluntarily without the necessity of litigation, contested or uncontested."

U.S. Pet. at 12-13.

where injunctive remedies will subordinate the job rights of competing innocent employees, it is particularly important that such remedies be tailored to righting the wrong that was done *and no more*. This Court has never held that Title VII grants courts authority to award preferential treatment to non-victims. Yet the theories the Government seeks to pursue—but not the issue actually presented by this case—require that such a holding be made.

Moreover, Title VII contains an express prohibition against Government *imposition* of racial preferences to overcome underrepresentation of minorities. Section 703(j) of the Act, 42 U.S.C. § 2000e-2(j). Once a court-ordered "remedy" goes beyond making the victims of a violation whole to giving job preferences to non-victims, it is arguably no longer a remedy but a preference the sole purpose of which is to redress a numerical imbalance. And, the Government concedes in its petition "that . . . Executive Order [11246] cannot override Title VII." U.S. Pet. at 16. Any Government claim, therefore, that the OFCC has the power, pursuant to the Executive Order, to direct employers to grant preferential treatment based upon race to non-victims of discrimination must be measured against the expression in § 703(j) of Congressional hostility to Government imposition of such preferential treatment.

We do not mean to suggest that these considerations are *necessarily* fatal to the Government's theories, but we have noted them to show that the Government's theories implicate a number of difficult subsidiary questions which are not implicated by the question presented on the present record. The issue actually raised by the record in this case requires only discerning Congress' intention with respect to the permissible scope of *voluntary* private affirmative action.

Nor do we mean to suggest that the Government's theories are unimportant; indeed, in an appropriate case, they may well merit this Court's attention. But this case presents an issue which both is analytically distinct from,

and relates to different practical situations than, the Government's issues—one which is ready for decision now, and which merits this Court's immediate attention.

III.

It is of great practical importance that this Court address the question actually decided by the courts below—the question which we have raised in our petition—and not leave that question unresolved as the Government requests. The decision below poses immediate practical problems for USWA and the large segments of American industry with which it deals—as well as for other unions and employers—which have voluntarily established affirmative action programs for reasons other, and upon bases other, than the nice justifications the Government now sets out in its petition. The legality of those programs depends on the answer to the question which USWA has asked this Court to decide: whether, irrespective of the existence of prior discrimination at the plant, Title VII forbids private parties from voluntarily establishing programs like the one here to redress the effects of historic societal discrimination upon their workforce. Without an answer to that question, USWA, the employers with whom it deals, and other employers and unions will not have the guidance they need as to the legality of present affirmative action programs, much less as to whether they may lawfully establish new programs along the same lines.

The remand the Government requests would not only be pointless, as discussed in part I *supra,* the delay it would occasion would have serious harmful consequences to the national interest, as described in our petition at 10-11.[7]

[7] That American industry shares our view as to the need for immediate resolution is evident from the Brief Amicus Curiae of the Equal Employment Advisory Council In Support Of Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit.

CONCLUSION

The issue which is presented by this case is ready to be decided now. For the reasons stated in USWA's petition, this Court should grant certiorari to decide that issue, and should not summarily remand as the Government requests.

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Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435, 78-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA, RESPONDENTS

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

May an employer and labor union, solely in order to achieve a desired ratio of minority workers in craft positions at a manufacturing plant and in the absence of any prior discrimination against the minority workers at that plant, institute a racial quota for admission to craft training programs that is preferential to members of minority groups and discriminates against whites, where job seniority would ordinarily determine entry into the training programs?

STATEMENT OF THE CASE

1. In order to achieve a desired ratio of minority workers in craft jobs at a manufacturing plant in Gramercy, Louisiana, petitioners, Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA"), instituted a racial quota requiring that at least 50 per cent of all applicants selected into craft training programs be members of minority groups.

The racial quota of Kaiser and USWA was instituted as part of the 1974 Labor Agreement executed by the parties. The agreement provides in part that "certain goals and time tables" shall be established by a joint committee to facilitate the achievement of a "desired minority ratio" in existing trade, craft and assigned maintenance classifications at various Kaiser plants,

including the Gramercy Plant.[1] The percentage "goal" established by the joint committee for the Gramercy Plant was 39 per cent, based on the percentage of minority workers in the available work force in the area.[2] The agreement stated:

> [A]t a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .[3]

Apart from the racial quota imposed by Kaiser and USWA, the sole qualification for entry into the training programs is the seniority of applicants.[4] This seniority is determined on the basis of "length of employment at the plant and is not affected by departmental or job seniority. All workers at the plant are included in this seniority line."[5]

Respondent, Brian F. Weber, was employed as a lab analyst at the Gramercy works of Kaiser. In April, 1974, a company "bid" for on-the-job training programs in three craft categories was posted by Kaiser. Pursuant to the standard procedure of Kaiser and USWA, applicants

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1 Fifth Cir. App., 196.
2 Fifth Cir. App., 95.
3 Fifth Cir. App., 196.
4 Fifth Cir. App., 197.
5 Fifth Cir. App., 198.

were to be selected for those programs on the basis of seniority. However, a condition of the bid was that at least half of the persons selected as prospective trainees would be applicants who were members of minority groups.[6]

Mr. Weber and other white members of the plaintiff class applied for the training programs. However, members of minority groups with less seniority than white employees were selected preferentially by Kaiser for these programs to meet the established quota of at least 50 per cent minority representation.[7] In each instance of selection of a minority applicant, one or more white workers with greater seniority than members of minority groups selected for the training programs were denied entry into the training programs solely on the basis of the racial criterion.[8]

Subsequently, company bids were posted for additional craft training openings.[9] The selections for these openings were made on the basis of the 50 per cent minority requirement. One of the bids barred applications by any white employee, as the bid was specifically limited to minority employees only.[10] In all, in the period April through October, 1974, seven minority employees were selected for positions in training programs in preference to white employees pursuant to the 50 per cent quota.[11]

6 Fifth Cir. App., 197-98.

7 Fifth Cir. App., 198.

8 Fifth Cir. App., 197.

9 Fifth Cir. App., 198.

10 Fifth Cir. App., 198.

11 Fifth Cir. App., 198.

2. Mr. Weber filed a charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC").[12] No action was taken and a right-to-sue letter was issued after 180 days.[13] Mr. Weber filed the right-to-sue letter in the district court and counsel was requested by the district court to investigate the charge and institute suit if appropriate. The Complaint was filed on December 31, 1974.[14]

Prior to the filing of Answers by Kaiser and USWA, counsel for Mr. Weber was contacted by a staff attorney of the EEOC. A request was made by the EEOC attorney that the pleadings filed on behalf of Mr. Weber be provided to the EEOC. On February 1, 1975, the pleadings already filed in the case were transmitted to the EEOC and additional pleadings were transmitted on February 14, March 7 and March 19, 1975.[15] On March

12 Fifth Cir. App., 58-59.

13 Fifth Cir. App., 14-15.

14 Fifth Cir. App., 1-5. Thereafter, counsel was formally appointed to represent Mr. Weber. See 42 U.S.C. §2000e-5(f)(1). Fifth Cir. App., 6-8.

15 The correspondence to Marian Halley, Esq., a staff attorney of the EEOC, is not part of the record. In view of the proposal by the United States of America and the Equal Employment Opportunity Commission for a remand of this case, and the reliance of these parties on extra-record "evidence," we believe a review of these facts is appropriate.

On February 1, 1975, the pleadings on file, including the Complaint, were transmitted to Ms. Halley. On February 14, 1975, the Class Action Allegations and a stipulation of facts proposed by the plaintiff were transmitted. The Motion to Maintain Class Action, Memorandum in Support of Motion to Maintain Class Action, notice of the class action hearing, and a draft of the pre-trial order were sent to Ms. Halley on March 7, 1975. The order designating the case a class action, the Approved Form of Notice to the class, and the Pre-Trial Order were transmitted on March 19, 1975. However, the EEOC failed to enter the case at the trial court level as an intervenor, *amicus curiae*, or in any other capacity.

20, 1975, a telephone request was made by the EEOC for documents that had already been transmitted. The pre-trial memorandum of the plaintiffs was sent to the EEOC on March 28, 1975.

The trial was conducted on April 1, 1975. At that time, a stipulation was read into the record that "an attorney by the name of Marian Halley, with the Equal Employment Opportunity Commission, has been in touch with all counsel in this case. . . . [T]he EEOC has some interest in this case, although it decided not to intervene prior to this trial, and [the EEOC] may want to get involved, either with a post-trial brief to Your Honor, or if the case is appealed, at the level of the Fifth Circuit."[16] In a telephone discussion three days after the trial, Ms. Halley informed counsel for Mr. Weber that the EEOC had determined that it would not intervene at the district court level. Copies of the stipulation of the parties and six of the seven exhibits filed into evidence were transmitted to Ms. Halley.[17]

16 Fifth Cir. App., 53.

17 The relevant portion of the seventh trial exhibit, the 1974 Labor Agreement, was contained in the stipulation.

The case was under advisement in the district court for more than a year. The decision of the district court was rendered June 17, 1976. In November, 1975, while counsel for Mr. Weber was at the EEOC (in connection with settlement discussions in a case in which counsel was appointed to represent a black Title VII plaintiff), counsel sought out Ms. Halley to further discuss the possibility of participation in the *Weber* case by the EEOC. Counsel was informed that the EEOC had determined that it would not intervene until the case reached the appellate level.

The suit of Mr. Weber was filed and certified as a class action.[18] Pursuant to the order of the district court, the Approved Form of Notice was required to be posted "on all employee bulletin boards at the Gramercy, Louisiana works . . . and at the Union Hall [of USWA]."[19] The Approved Form of Notice stated in part that the suit "alleges that the selection policies of the defendants for [on-the-job] training programs, which require the selection of minority applicants to fill at least fifty percent of the available vacancies in the training programs, constitute race discrimination [in violation of Title VII and 42 U.S.C. §1981]."[20]

3. At the trial, substantial evidence was presented by all the parties concerning the purported justifications for the racial quota, the history of employment practices at the Gramercy plant, and the training programs requiring prior experience that pre-existed the training programs instituted under the 1974 Labor Agreement. USWA contended and attempted to prove that discrimination against blacks had occurred at the Gramercy plant.[21] The district court rejected this argument and

18 Fifth Cir. App., 1-5, 20-23.

19 Fifth Cir. App., 37.

20 Fifth Cir. App., 35. The notice, of course, had the formal effect of binding only the white members of the class to the outcome. However, as it was posted on all employee bulletin boards and at the union hall, it provided notice to all employees of the pendency and nature of the suit.

21 E.g., Post-Trial Brief of Defendant United Steelworkers of America; Fifth Cir. App., 110-11.

found that there was no prior discrimination at the Gramercy plant.[22]

The primary reason for the adoption of the 50 per cent quota for selection into the craft training programs was the small percentage of minority workers in craft jobs as compared with the minority labor force as a whole.[23] Prior to the institution of the training programs under the 1974 agreement, only about two per cent of the craftsmen at the Gramercy plant were minority employees.[24] According to the Industrial Relations Superintendent of Kaiser, Kaiser and USWA were "striving to obtain . . . a 39 per cent minority population in each of the craft families . . . .[25] The one-for-one hiring program was the means adopted to achieve this goal.

Kaiser was motivated to adopt the 50 per cent quota in part because of its perception of the wishes of federal contract compliance officers.[26] However, Kaiser was not ordered to implement this action.[27] Kaiser had a substantial economic reason to comply with federal contract compliance suggestions.[28] In addition, Kaiser believed

22 Opinion of the district court, 415 F. Supp. 761, 764.

23 Fifth Cir. App., 19.

24 Fifth Cir. App., 98; Kaiser Exh. 3.

25 Fifth Cir. App., 95.

26 Fifth Cir. App., 77, 87, 145.

27 Fifth Cir. App., 88.

28 Fifth Cir. App., 121.

that it was furthering a national social policy by the adoption of the racial quota.[29]

USWA appears to have concurred in the adoption of the racial quota as an affirmative action measure.[30] However, USWA had negotiated for years for the institution of training programs to provide its members with access to craft jobs.[31] In the words of the attorney for USWA, "the Union's efforts were directed towards obtaining additional opportunities for their members, who were also Kaiser employees, as opposed to creating opportunities for people from the street."[32] Thus, the training programs were instituted to benefit union members, and were not solely an affirmative action measure containing incidental benefits for white as well as black union members.

The racial quota was not implemented by Kaiser and USWA to remedy past discrimination, but instead was designed to help uplift the employment status of minority workers as a class.[33] As USWA states in its Petition

29 Fifth Cir. App., 149-50. The district court indicated that the racial quota was also adopted to avoid "vexatious litigation," but there was no evidence that any black employees had threatened suit based on the makeup of craft positions at the Gramercy plant. The agreement was adopted for a number of plants, some of which may or may not have been potential litigation targets.

30 See Petition for a Writ of Certiorari filed on behalf of USWA in this Court, No. 78-432.

31 Fifth Cir. App., 115.

32 Fifth Cir. App., 133.

33 Opinion of the district court, 415 F. Supp. at 765. Fifth Cir. App., 210.

for a Writ of Certiorari, "the agreements were not confined to curing past employer discrimination, and no effect was made to assess on a plant-by-plant basis the employer's potential culpability for the absence of black craftsmen."[34] No effort was even made by Kaiser and USWA to determine that the favored minority workers actually suffered societal discrimination.[35] Indeed, the director of equal employment opportunity affairs of Kaiser admitted that some blacks may not have suffered societal discrimination, while some whites may have endured this hardship.[36] Nevertheless, the racial quota in this case was enacted because the "sum total of experience" indicated that minorities generally have suffered past discrimination, not at Kaiser in particular, but in society at large.[37]

Although the percentage of minority craftsmen at the Gramercy plant was smaller than the minority representation in the labor force overall, it was not smaller than the percentage of minority craftsmen in the Gramercy area.[38] Indeed, minority craftsmen were virtually unavailable.[39] Kaiser, under federal super-

34 Petition for a Writ of Certiorari of USWA, No. 78-432 at 5.

35 Fifth Cir. App., 161, 168.

36 Fifth Cir. App., 158.

37 Fifth Cir. App., 157.

38 Fifth Cir. App., 119-20.

39 Fifth Cir. App., 119-20, 146.

vision,[40] tried a number of affirmative action methods to attract minority craftsmen. The company set goals and timetables to increase the percentage of minorities in the crafts. In addition, it advertised "in minority-only newspapers" and maintained separate craft application files.[41] According to the Industrial Relations Superintendent, Kaiser "always" tried to locate and hire blacks in preference to whites for craft openings.[42] However, the few minority craftsmen in the area were already employed "because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."[43] The quota was instituted because "the officials of both Kaiser and the Steelworkers realized that something more than the ordinary, look until you find them, had to be done to get blacks into the crafts."[44]

Prior to the institution of the training programs involving no prior experience requirement in 1974, Kaiser filled its craft positions primarily by hiring fully trained craftsmen from outside the plant.[45] However, pursuant to the efforts of USWA to open craft jobs to union members within the plant, Kaiser instituted two partial training programs prior to 1974 in which persons with

40 Fifth Cir. App., 121.

41 Fifth Cir. App., 99.

42 Fifth Cir. App., 99.

43 Fifth Cir. App., 100.

44 Fifth Cir. App., 101. This statement was made by Dennis E. English, Industrial Relations Superintendent of Kaiser.

45 Fifth Cir. App., 103.

previous experience were accepted and trained.[46] The training programs involved acceptance of persons with experience of one year in the Carpenter-Painter craft from 1964 until 1971, acceptance of applicants with three years experience in the General Repairman category from 1968 until 1971, and selection of persons with two years experience in the General Repairman craft from 1971 until 1974.[47]

In these training programs involving selection of employees with prior experience, it was necessary only for Kaiser to provide training to the employee for the balance of training he did not have.[48] Thus, the General Repairman training program into which employees with three years experience were selected lasted two years; when this program was modified for selection of applicants with two years experience, the training program was lengthened to three years.[49] The minimum cost to Kaiser of each year of training, for each trainee, was $15,000 to $20,000.[50]

Of 292 craft employees at Kaiser in 1975, only 28 entered through the prior experience training programs.[51] These training programs were open to members of minority groups as well as whites with the

46 Fifth Cir. App., 102, 196-97.

47 Fifth Cir. App., 196-97.

48 Fifth Cir. App., 102.

49 Fifth Cir. App., 197.

50 Fifth Cir. App., 107.

51 Fifth Cir. App., 197.

requisite experience.[52] Of the 28 persons who completed the prior experience training programs during their 10 year existence, seven per cent were black.[53] This percentage is identical to the ratio of black bidders with no prior experience in the top 28 positions of seniority at the time of the institution of the training programs at issue in this case.[54]

4. The district court issued an opinion holding the racial quota illegal under Title VII.[55] The district court also found that the quota adopted by Kaiser and USWA was not implemented "with a view toward correcting the effects of prior discrimination."[56] In addition, the district court found:

> The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on the job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.[57]

52 Fifth Cir. App., 196.

53 Fifth Cir. App., 196. Two of 28 persons in the training programs were black.

54 R., Joint Exh. 3.

55 415 F. Supp. 761.

56 *Id.* at 765.

57 *Id.* at 764.

The court of appeals affirmed,[58] holding that "[i]t is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race."[59] The court held that while remedial action designed to correct past discrimination by the employer and restore employees to their "rightful place" is permissible under Title VII, racial preferences are not.[60] The court of appeals concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII.[61]

ARGUMENT

We agree with the petitioners that this case presents an issue of great importance. However, this Court may

58 The opinion is reported at 563 F. 2d 216. Judge Wisdom dissented from the decision.

59 563 F. 2d at 223.

60 *Id.* at 225.

61 *Id.* at 226. After the decision of the court of appeals, the United States and Equal Employment Opportunity Commission, which had participated at the appellate level as *amicus curiae*, moved for and were granted permission to intervene as parties. The appellants petitioned for rehearing and suggested rehearing *en banc*. These petitions were under consideration for more than three months, but were denied on April 17, 1978. 371 F.2d 337.

not wish to reach and dispose of the issue at this time. Valid grounds exist for a denial of certiorari. The decision of the court of appeals is correct under the law, properly distinguishing remedial action from preferential treatment of minority workers at the expense of whites.

If the Court does decide to grant the writ of certiorari, it should not permit the resolution of the issue to be clouded by speculation and gratiutous opinions concerning the adequacy of the fact-finding of the district court and the factual review of the court of appeals. If this injection of intimations will hinder the process of review, the writ should be denied. The suggestion of United States and EEOC ("the Government") that the case be remanded has no basis and is nothing more than a transparent effort to avoid the resolution of the issue on facts that are fatal to the Government's position. This suggestion should be rejected.

I. Valid Reasons Exist To Deny The Writ Of Certiorari

While we do not dispute the contention of the petitioners that this case involves an important issue, the Court nevertheless would have good reason to deny the writ of certiorari. Numerous considerations could lead the Court, as a judicial tribunal with ultimate authority and unique responsibility, to refrain from exercising its discretionary review. This decision would be supported by at least the following factors.

First, the decision of the court of appeals is consistent with the express language and intent of Title VII and the

decisions of this Court. Title VII specifically prohibits an employer from discriminating against *anyone* on the basis of race.[62] In addition, it explicitly prohibits race discrimination in the selection of applicants for training programs.[63] The legislative history of Title VII establishes that the intent of Congress is consistent with the plain meaning of the prohibition.[64] This Court, in *McDonald* v. *Santa Fe Trail Transportation Co.*,[65] ruled that white persons may assert claims under Title VII and the same standards that are used in cases involving minority workers are applicable to the claims of whites.[66] In *Griggs* v. *Duke Power Co.*,[67] the Court reviewed the purpose and intent of Congress in adopting Title VII. It stated: "[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination,

62 42 U.S.C. §2000e-2(a). This section prohibits discrimination "against any individual . . . because of such individual's race . . . ." See also 42 U.S.C. §2000e-2(j).

63 42 U.S.C. §2000e-2(d).

64 The legislative history is exhaustively reviewed in *Jersey Central Power & Light Co.* v. *Local 327, IBEW*, 508 F.2d 687 (3d Cir. 1975) and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir., 1974). The intent of Congress insofar as it affects this case is amply demonstrated in the "Objections and Answers" concerning Title VII submitted by Sen. Joseph S. Clarke, a floor manager of the bill. It states:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.
>
> 110 Cong. Rec. at 7218 (1964).

65 427 U.S. 273, 96 S. Ct. 2574 (1976)

66 427 U.S. at 280, 96 S. Ct. at 2579.

67 401 U.S. 424, 91 S. Ct. 849 (1971).

or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[68] As recently as the last term, in *City of Los Angeles, Department of Water and Power* v. *Manhart*,[69] the Court in a sex discrimination case stated that Title VII was "designed to make race irrelevant in the employment market."[70] In addition, the Court stated that "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."[71] Thus, the preference in this case was properly ruled to violate Title VII.

Second, the decision of the court of appeals is supported by the analagous holding of this Court in *Regents of the University of California* v. *Bakke*.[72] The Court in *Bakke* invalidated a special medical school admissions program that reserved 16 per cent of the places in the entering class for members of minority groups. As white applicants were not permitted to compete for the seats reserved for minority applicants, the special admissions program was ruled illegal.[73] *Bakke* was not decided under Title VII and involved academic considerations unique to the university setting. Nevertheless, it provides strong

68 401 U.S. at 430-31, 91 S. Ct. at 853.

69 98 S. Ct. 1370 (1978).

70 *Id.* at 1376.

71 *Id.*

72 98 S. Ct. 2733 (1978).

73 *Id.* at 2764. (Powell, J., announcing the judgment of the Court).

support for the holding of the court of appeals, especially since many of the factors tending to support the admissions program in *Bakke* are not present in this case.[74]

Third, while the decision of the court of appeals has broad importance, it will have a direct impact only in the Fifth Circuit. The post-decision experience in the Fifth Circuit could provide a barometer for a future resolution of the issue presented on a national scale. This consideration also applies to the decision in *Bakke*, which has been on the books only for a few months. The Court may wish to allow additional time for the assessment of the impact of the *Bakke* holding. Thus, the Court may wish to delay the resolution of the issue in this case, especially since the decision of the court of appeals is not out of step with the prior decisions of the Court.

74 Title VII repeatedly has been interpreted to prohibit preferences for any race. See, e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 853 (1971). *Bakke* was decided under Title VI and the Fourteenth Amendment, and the meaning of Title VI was disputed. Moreover, the First Amendment interest in furthering academic freedom is not present here. Furthermore, in *Bakke* the admissions program as a whole was not based solely on objective criteria. E.g., see 98 S. Ct. at 2740 (Powell, J.); 98 S. Ct. 2807 (Blackmun, J., dissenting). In this case, the seniority criterion for selection into training programs provides benefits based on time of service to the employer, applies equally in the absence of discrimination in the provision of seniority rights, and is valid under Title VII. 42 U.S.C. §2000e-2(h).

II. In The Alternative, The Writ Should Be Granted Only For The Resolution Of The Basic Issue: The Legality Of A Racial Quota Implemented At The Expense Of The Seniority Rights Of Whites To Achieve A Desired Minority Ratio In Designated Jobs.

Good reasons would support a decision to deny the writ of certiorari. On the other hand, the Court may be persuaded by the importance of the issue to grant the writ. If so, the Court should review this case only to resolve the legality of a racial quota implemented at the expense of the seniority rights of whites to achieve a desired minority ratio in designated jobs.

While the "Question Presented" in each of the petitions appears to reflect the petitioner's characterization of the basic issue in this case, we are concerned about the gratiutous assertions of Kaiser and the Government concerning the adequacy of the factual findings in the courts below.[75] We do not understand these parties to be requesting a review of the facts, but they do appear to suggest that the Court should subjectively assume that past discrimination, after all, must have been present at the Gramercy plant, despite the holding of the district court and court of appeals to the contrary. We believe that the record provides full support, including statistical data, for the findings of the

75 Petition for a Writ of Certiorari of Kaiser, No. 78-435 at 11; Petition for a Writ of Certiorari of the Government, No. 78-436 at 14.

district court and the court of appeals. In any event, it is not the function of this Court to review or make assumptions concerning factual determinations of the lower federal courts. If the writ is to be granted, it should contemplate the resolution of the important legal issue that is presented. In addition, the Court should reject the frivolous recommendation of the Government that the case be remanded for a reopening of the record.

A. *The Only Issue Worthy of Review Is the Legal Question Presented Under the Facts as Determined in the Lower Courts.*

The factual determinations of the district court and the court of appeals are correct. The district court expressly held that there was no past discrimination at the Gramercy plant. The record is complete and fully supports this finding. The only issue of importance is the legal question presented under the facts. Therefore, if certiorari is granted, the factual determinations of the district court and court of appeals should be accepted.

The Government mistakenly claims that none of the parties had an incentive to prove past discrimination at the trial, but USWA did make this attempt and the effort was unsuccessful.[76] The Government can be excused for not knowing this, since it declined to take part in the trial. In addition, the district court was fully aware of the importance of an examination of the prior conduct of

76 R., Post-Trial Brief of Defendant, United Steelworkers of America.

Kaiser in the resolution of this case. The evidence received extensive consideration at the trial and appellate level. Only a strained interpretation of the facts could have justified any finding of past discrimination.

The Gramercy plant was opened in 1957 or 1958 and discrimination against blacks never occurred at this plant.[77] Blacks who were hired when the plant opened have obtained senior status and high-paying jobs.[78] Separate lines of seniority for minority and non-minority employees were never maintained prior to the institution of the reverse racial quota.[79] All workers are given plant-wide seniority. Selection for training programs, in the absence of the racial quota, is based on length of employment at the plant.[80]

As the court of appeals noted, although a low percentage of minority workers were employed in craft jobs, minority craftsmen were not available in the local labor force.[81] No disparity existed between the ratio of minority craftsmen at Kaiser and their availability in the work force. In addition, although USWA argued at the trial that the prior experience requirement for the pre-1974 training programs was discriminatory, this contention had no merit. First, the statistics demonstrate

77 Fifth Cir. App., 122.

78 Fifth Cir. App., 113.

79 Fifth Cir. App., 114-15.

80 Fifth Cir. App., 198.

81 563 F.2d at 224 n.13; Fifth Cir. App., 119-20, 146. This fact does not appear to be disputed.

that the prior experience requirement did not have a disparate impact on minority workers.[82] Second, the evidence established that prior experience was not only a prerequisite for entry into training programs, but also a substitute for training. Kaiser was forced to extend its training programs when the prior experience requirement was dropped to the full extent of the experience previously required.[83] As the training cost $15,000 to $20,000 per year per trainee, the prior experience requirement was job related.[84] Third, the prior experience training programs involved only 28 persons over 10 years. As the court of appeals held,[85] this program is too limited in scope to justify the racial quota at issue in this case.

Despite the implied contentions of incidental discrimination, none of the petitioners claim that any of the minority workers preferred under the racial quota ever suffered discrimination at the Gramercy plant. Thus, it is conceded that none of these parties are identifiable victims of past discrimination. In addition, no one claims

82 Of the 28 persons who entered the prior experience training programs during their 10 year existence, two were black. App., 196. Of the 28 bidders having the most seniority at the Gramercy plant at the time of trial, two were black. R., Joint Exh. 3. Had the prior experience requirement never existed, these 28 employees would have been eligible to bid for the first 28 positions in training programs requiring no experience. The percentage of minority workers that entered the training programs with the prior experience requirement is identical to the percentage that presumably could have entered if the prior experience requirement had never existed.

83 Fifth Cir. App., 197.

84 Fifth Cir. App., 107.

85 563 F.2d at 224 n.13.

that the racial quota was adopted as a remedy for past discrimination. The sole purpose for favoring the minority workers at the expense of white employees is the general purpose for the inclusion of the quota in the 1974 Labor Agreement: to achieve a designated ratio of minority workers in the crafts in conformity with a policy to favor classes presumed to be disadvantaged.

The important issue in this case is the legality of a racial quota used as an affirmative action measure. Most employers, whether or not they fear the possibility of litigation or government interference in their affairs, do not believe they have discriminated in the past. Yet employers are required under federal contract compliance programs to establish "goals" and "timetables" for the elimination of "underutilization" of minorities; quotas and other preferences favorable to minority workers are commonly implemented to satisfy the regulatory agency.[86] A substantial number of white workers today are suffering employment discrimination because of these practices.

The legality of the use of a quota to prefer government-designated classes is also important because the EEOC has proposed guidelines to legalize employment discrimination against non-minority workers under affirmative action programs.[87] The

86 41 C.F.R. §§60-2.11, 60-2.12.

87 Interpretative Regulations Guidelines Relating to Remedial and/or Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964. Comments relating to the proposed guidelines were to be submitted to the EEOC on or before March 1, 1978. The revisions drafted in light of comments received by the EEOC have not been finalized.

proposed guidelines would permit or require the use of racial or sexual preferences or quotas whenever an "underutilization" of a designated class is found to exist in any particular job classification.[88] The preferences would be legalized even in the absence of past discrimination against minorities. They could be granted on a class basis, with no need for restriction to identifiable victims of past discrimination committed by the employer or other person subject to Title VII.[89]

The proposed guidelines would eliminate non-minority employees as potential claimants eligible for administrative determinations of their claims whenever employers have granted preferences to minorities under affirmative action programs.[90] In addition, under Section 713(b) of Title VII,[91] the guidelines could provide a complete defense barring any action under Title VII

88 *Id.*, Part III. A "self-analysis" may show a need for affirmative action solely on the basis of disparities in the percentage of minority or female employees in the work force of the employer as compared to minority persons or females in the "relevant job market who possess the basic job related qualifications." *Id.* The "affirmative action" programs "include the use of race, color, sex, and ethnic-conscious goals and timetables, ratios, or other numerical remedies . . . ." *Id.*

89 *Id.*, Part II, Part III. The affirmative action would be required even if no admission or finding of past discrimination exists and even if there is no evidence sufficient to prove a violation of Title VII. Preferences need not be restricted to identifiable victims of past discrimination by the employer or other persons subject to Title VII.

90 *Id.*, Part V. The EEOC would dismiss charges filed by non-minority employees under these conditions.

91 42 U.S.C. §2000e-12(b).

against an employer that relied on the guidelines in discriminating against non-minority employees.[92] While the resolution of the issue on this case would not determine the validity of the proposed guidelines, it would provide an on-point determination of whether Title VII prohibits the use of employment preferences to uplift the economic status of classes believed to be disadvantaged. If any issue is to be resolved in this case, it should be the legal issue that is important to the employment hopes of millions of non-minority workers.

B. *The Transparent Request of the Government for a Remand Should Be Denied.*

In view of the conflict between Title VII and the present "affirmative action" policy of the Government, we are not surprised the Government wishes to avoid the resolution of the issue by the Court. The Government would like to delay the ultimate decision or at least have the issue resolved on a more favorable set of facts. However, instead of simply requesting that the writ be denied, the Government suggests that the holding of the court of appeals be "un-decided" by a remand for further proceedings. The asserted grounds for this request are ludicrous.

The Government first suggests that the case should be remanded for a determination of whether the action

92 *Id.* This section provides that if an employer commits an unlawful employment practice "in reliance on any written interpretation or opinion of the Commission," the employer may not be subject to liability in "any action or proceeding based on any alleged unlawful employment practice."

of Kaiser and USWA was consistent with the requirements of Executive Order 11246.[93] No doubt, Kaiser and USWA are surprised to learn of the Government's uncertainty as to whether their action is even proper under the Executive Order. In any event, in view of the Government's acceptance of the "premise that the Executive Order cannot override Title VII,"[94] the proposed analysis of the meaning of the Executive Order would be useless. The racial quota enacted by Kaiser and USWA either violates Title VII or it does not. The consistency of the program with the Executive Order is at best an incidental academic issue. We do not believe a remand is appropriate to obtain an advisory opinion from the district court.

The Government also suggests that the case be remanded for reconsideration in light of *Bakke*. On its face, this suggestion does not even promise an interesting academic exercise, because *Bakke* supports the decision of the court of appeals.[95] The Government apparently recognizes this problem, because it deemed it necessary to lodge documents from its files with the Clerk of this Court in an attempt to suggest an issue under *Bakke* requiring the receipt of new evidence. This alleged issue relates to "the presence of governmental

93 Petition for a Writ of Certiorari of the Government, No. 78-436 at 17.

94 *Id.* at 16.

95 See text at pp. 74-76 *supra*.

findings of discrimination by the employer [and] governmental participation in developing the affirmative action program."[96]

While the Court in *Bakke* did review past decisions involving government findings "of past discrimination by the industries affected [and government-fashioned] remedies . . . to rectify the discrimination,"[97] the Court broke no new ground in this area. The decisions reviewed by this Court in deciding *Bakke* were available to the district court and the court of appeals. Moreover, as the Government has conceded that actions taken in furtherance of the Executive Order would not survive a conflict with Title VII, the relevance of the extent of government involvement is difficult to fathom. Furthermore, the record is complete with respect to the reasons for the adoption of the racial quota: Kaiser and USWA voluntarily adopted it to *avoid* governmental intervention. The government did not fashion a remedy to rectify past discrimination and the documents lodged with the Clerk do not suggest that it did.[98] Finally, a review of the documents filed by the Government reveals the lame nature of this transparent proposal to "un-decide" the case.

96 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

97 *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733, 2754 (1978) (Powell, J.) (Slip Op. 32). This is the passage primarily relied on by the Government.

98 In view of the Government's uncertainty as to the consistency of the racial quota with the Executive Order, it is hard to believe that the suggestion is seriously offered that the quota was implemented by the Government.

In reviewing the description of these documents in the Petition of the Government, we expected to find that they contained something of significance. After all, the documents were characterized as containing "findings and recommendations."[99] Upon obtaining copies,[100] however, we found that the missing "evidence" consists only of a 1973 file memorandum and a letter and enclosure mailed in 1971, more than three years prior to the enactment of the racial quota.[101] Only a few sentences in these documents relate to the crafts or to training programs at the Gramercy plant. The statements made by the OFCC appear to be nothing more than preliminary opinions or suggestions.

In addition to the tenuous relevance and uncertain reliability of the 1973 file memorandum and 1971 letter, these documents on their face do not say what the Government represents them as saying. Contrary to the exaggerated claim of the Government, no statement is contained in the 1973 file memo that Kaiser "waived its

99 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

100 The Government failed to include the content of the documents in its Appendix and failed to mail copies to the parties. The documents were provided, however, after we requested them.

101 We know of no authority for lodging these documents with the Clerk, but presume that the Court can look at anything it desires in reaching its decisions. Of course, the documents have not been cross-examined, contain hearsay within hearsay, and presumably were carefully selected on the basis of a full file search designed to produce something favorable to the Government's position. In these circumstances, and in view of the volume of documents in the files of the federal Government, it is significant that the Government could find nothing more substantial than a file memorandum and an aged letter and attachment. In any event, a remand should not seriously be considered on the basis of the Government's so-called "evidence."

prior experience requirement for whites but not for blacks, who had applied for craft positions."[102] Instead, this file memo states that "several" Caucasians did not possess the required prior experience for transfer into the maintenance crafts and the company voluntarily agreed that *all* "Negro applicants for transfer to the maintenance crafts will be required to possess no more experience than the least qualified . . . Caucasian . . . . regardless of any experience requirements which might be validated . . . ."[103] This statement affects "several" people at most, does not make a finding of an intentional waiver, does not state that blacks were discriminated against, and suggests the establishment of a preference for blacks that pre-existed the racial quota.

The 1971 communication to Kaiser is represented by the Government as if it required the establishment of a training program with a racial quota: "The OFCC recommended at that time that a training program should be established and that at least 50 per cent of the new craft employees should be black."[104] This artful language does not accurately portray the document. In fact, the OFCC said merely that "[m]aintenance craft training programs are needed;" with respect to "direct hiring" into the crafts, it said that the hiring should include "at least the minority ratio that exists in the company's

102 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

103 File Memorandum of January 31, 1973, Paragraph 4.

104 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

recruitment area."[105] These statements do not suggest a government-fashioned racial quota in training programs. Moreover, they relate to the problem of underutilization rather than past discrimination and are more in the nature of comments than findings or determinations.[106] Despite the contrary claim of the Government, we can locate no statement in this document "that Kaiser did not actively recruit blacks for craft positions."[107]

The documents relied on by the Government could hardly be characterized as supporting the racial quota in this case.[108] The evidence shows that Kaiser and USWA were cognizant of OFCC requirements in establishing the racial quota, but devised it voluntarily and without

105 Attachment to letter of Jan. 25, 1971, Paragraph 24(g). (Emphasis added). According to the OFCC attachment, the minority ratio in the Gramercy area was set at 50 per cent. The minority ratio in the labor force was later fixed at 39 per cent.

106 *Id.* Indeed, it was "recommended" only that "plans be developed" to deal with the problems.

107 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

108 The 1971 OFCC comments include helpful hints to the employer in the recruitment of minority workers, some of which appear to reflect underlying assumptions of the OFCC. For instance, it is suggested that Kaiser (1) identify minorities attending secretarial, commercial, and vocational schools, but contact only "the more promising students," (2) identify the "more promising students" at minority high schools to insure selection of "the 'cream of the crop,' " and (3) train "promising" minority youths with previous schooling in clerical fundamentals: "These employees loaded (sic) with day-to-day work and in very short time, usually 4 to 6 weeks, are capable of performing at the required level." Attachment to letter of January 25, 1971, Paragraph 24(c).

the Government's participation. The submission of the Government merely underscores the fact that the racial quota is *not* a government-devised remedy for past discrimination. Furthermore, if the file search of the Government could produce only two tenuously relevant documents relating to a plant under vigorous federal scrutiny, the only valid presumption to be drawn is that the no-discrimination findings of the district court and court of appeals are correct.[109]

A remand for consideration of the so-called missing evidence would be useless and wasteful.[110] In addition, the suggestion that a remand should be granted to "permit one of the parties or an intervenor to seek to prove prior discrimination" has no merit.[111] All of the parties, including the Government, had this opportunity in the district court. The minority workers at the Gramercy plant had as much notice of the pendency of this action

109 The weakness of the legal position of the Government is demonstrated by its reliance on a strained interpretation of two aged and insignificant documents in support of the contention that the results of nearly four years of litigation in the federal courts should be vacated. We doubt that the Government would ordinarily propose this course, especially when it had declined the opportunity to present evidence when the record was open in the trial court.

110 We are at a loss to imagine what the district court would be expected to do with the OFCC documents on remand. Perhaps, in making the unnecessary determination of whether the Executive Order even authorizes the racial quota, as suggested by the Government, the district court could also analyze whether the suggestions and statements of the OFCC were authorized under the Executive Order.

111 Petition for a Writ of Certiorari of the Government, No. 78-436 at 19.

as the members of the plaintiff class, yet none intervened. The suggestion of the Government is a transparent attempt to avoid the issue. In addition, the reliance on *Parson* v. *Kaiser Aluminum & Chemical Corp.*,[112] involving a different Kaiser plant, is hardly persuasive. Indeed, in *Parson*, the court of appeals described the Gramercy plant as a "plant where no prior discrimination could be shown."[113]

The Government professes to believe in its legal position, but its request that the Court remand the case belies its asserted confidence. If this Court does not wish to dispose of the issue presented, the proper action is to deny the writ of certiorari, not to order a useless and wasteful remand. Therefore, the request of the Government should be denied.

CONCLUSION

The racial quota of Kaiser and USWA violates Title VII. The decision of the Court of Appeals is correct. Valid reasons exist for a denial of the writ of certiorari. On the other hand, no useful purpose can be served by the remand suggested by the Government. If the Court decides to grant the writ, it should do so only to resolve the basic legal issue presented: the legality of a racial

112 575 F.2d 1374 (5th Cir. 1978).

113 *Id.* at 1391-92 n.35.

quota implemented at the expense of the seniority rights of non-minority employees to achieve a desired ratio of minority workers in designated jobs.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Petitioner,
v.
BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
BRIAN F. WEBER, ET AL.,
Respondent.

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3 3 PRINTED IN U.S.A.

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Respondents.

BRIEF FOR PETITIONER UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

This brief is the joint product of petitioner, United Steelworkers of America (USWA), and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which USWA is affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire, in a case that is certain to occasion a multitude of presentations, to minimize the burdens on the Court by stating their common position once and not twice.

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 make unlawful a program, adopted by an employer and union in collective bargaining, which reserves for black bidders 50% of the openings in an in-plant craft training program in order to eliminate a racial imbalance in the skilled craft workforce?

STATEMENT OF THE CASE

This action was initiated on December 31, 1974, in the United States District Court for the Eastern District of Louisiana, by respondent, Brian F. Weber, a white production employee at the Gramercy, Louisiana plant of Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser"). Weber alleged that petitioners Kaiser and the United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), the exclusive bargaining agent for all production and craft employees at the Gramercy plant, were discriminating against him and other similarly situated white employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The alleged unlawful discrimination was the implementation by Kaiser and USWA of a nationwide collectively bargained program designed to eliminate racial imbalance in skilled craft positions. The program was established in the Kaiser-USWA collective bargaining agreement signed on February 1, 1974, and is applicable to all fifteen Kaiser plants throughout the country. The program provides that each Kaiser plant is to set as a goal that the proportion of blacks holding craft jobs match the proportion of blacks in the workforce in the community from which the plant draws its employees.[1] To meet that goal, on-the-job training programs were established at each plant to teach production workers the skills necessary to become craftsmen; the program reserves for black employees 50% of the openings in these newly created in-plant training programs. The complaint alleged specifically that the filling of craft trainee positions at the Gramercy plant pursuant to this program had resulted in junior black employees receiving such positions in preference to more senior white employees.

[1] Literally the program refers to "minority" employees rather than "black" employees. The term "minority" is used in the sense defined in the reporting requirements of the Equal Employment Opportunity Commission (hereinafter "EEOC"). (App. 138). In the context of this case, in which all minority beneficiaries have been and are likely to be black, the terms "minority" and "black" may be used interchangeably. (App. 127-128, 165-170). The program also establishes goals for filling craft training vacancies with female bidders; the goals for females are in addition to the goals for minorities, although successful female bidders for such vacancies, regardless of race, may be counted against the 50% reserved for minorities. (App. 145, 168).

The case was maintained as a class action pursuant to Rule 23(b) (2), with the plaintiff class defined as follows (App. 24):

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana works who are members of the United Steelworkers of America AFL-CIO, Local 5702, are not members of a minority group, and have applied or were eligible to apply for on-the-job training programs since February 1, 1974."

Following trial of Weber's application for a permanent injunction, the district court ruled that the Kaiser-USWA program's use of a racial quota in selecting craft trainees does violate Title VII, and, accordingly, entered judgment in favor of Weber and the plaintiff class and granted a permanent injunction prohibiting Kaiser and USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." (App. 171).

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed.

STATEMENT OF FACTS

The Plan

As a result of free collective bargaining, Kaiser and USWA entered into a nationwide agreement on February 1, 1974 covering terms and conditions of employment at 15 Kaiser plants (hereinafter "the master agreement"). That

agreement addressed a general problem which was being addressed by USWA at approximately the same time in its collective bargaining negotiations with each of the other companies in the aluminum industry, each of the companies in the can industry, and each of the companies in the steel industry (App. 93-94): the virtually complete absence of blacks in skilled craft jobs in the covered plants—an absence which contrasts, in many plants, with the presence of large numbers of blacks in production jobs. The approach to this problem taken in the 1974 nationwide Kaiser-USWA agreement was the same as that taken in agreements reached between USWA and the other companies mentioned. (*Id.*)[2]

The master agreement called for a goal to be set at each of the fifteen Kaiser plants for the proportion of minorities to fill positions in each category of craft jobs. (App. 137). The agreement further provided that such goals were to be achieved on the following basis (*Ibid.*):

> "As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates."

The master agreement established a joint company and

[2] In the steel industry, this agreement was incorporated into an industrywide consent decree receiving judicial approval. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert denied* 425 U.S. 944 (1976). However, as the decree court has recently stated, the "essence" of that decree "is a collective bargaining agreement between the union and the companies"; neither the parties nor the court had examined the facts at each of the 250 plants covered by the decree to determine whether there had been prior employer discrimination, nor had the parties or the court attempted to limit the quota to identifiable victims of past discrimination. *United States* v. *Allegheny-Ludlum Industries, Inc.*, No. CA 74-P-0339-S (N.D. Ala.), Memorandum Opinion filed March 21, 1978, pp. 3, 8-9.

union committee to, *inter alia*, take the steps necessary to put that minority quota provision into action. (*Id.*) The goals called for by the master agreement were set for each plant based upon the percentage of minorities in the workforce in the community from which the plant draws its employees. (App. 60, 145, 155).[3] And, the joint committee executed a memorandum of understanding, again applicable to all fifteen Kaiser plants, supplementing the master agreement with, *inter alia*, the following provision covering the filling of craft jobs through on-the-job training programs which were to be established (App. 145):

> "As on-the-job training and/or apprentice programs are established, each training class entering will be filled on a 50-50 basis. Employees in each training class shall be selected on the basis of the existing practice in each plant, however, 50% of the training class will be composed of only minority and/or female employees, including, if necessary, off the street hirees."

These provisions of the master agreement and the implementing memorandum of understanding (hereinafter sometimes referred to together as "the 1974 agreement") constitute the core of the national program established by Kaiser and USWA to increase the proportion of minorities in skilled craft positions at all of the Kaiser plants. The program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant. (App. 93-94)

Why The Plan Was Adopted

At trial, the director of equal opportunity affairs for "the entire Kaiser corporation," Mr. Thomas Bowdle,[4] testified as to the reason behind Kaiser's agreement to the

[3] The goals varied considerably from plant-to-plant ranging from 39% down to 1%. (App. 155.)

[4] Bowdle's name is spelled incorrectly in the trial transcript as "Bouble."

program.[5]

Bowdle made clear Kaiser's view that the discrepancy in the proportion of minorities in craft positions at Kaiser plants was not the result of racial discrimination by Kaiser in any of its employment practices, and that the minority employees favored by the new program were not the victims of any discrimination by Kaiser. (App. 99-101). Despite consistent urging from USWA over the years, Kaiser had not, prior to 1974, established apprenticeship or craft training programs enabling in-plant production workers to train and qualify for craft positions (App. 73, 97)[6]; rather, Kaiser filled its craft positions by hiring fully-qualified craftsmen from outside its workforce. (App. 71, 77, 95-96). Bowdle stated his opinion that the low number of blacks in craft positions throughout Kaiser's plants was a product of "fundamental effects of past discrimination in the field of education, job training, etcetera, ..." (App. 99-100), the same kind of "pervasive discrimination," which, in Bowdle's view, has resulted in there being relatively few minority lawyers, doctors, and engineers. (App. 100). Bowdle further stated that in the years preceding the 1974 agreement with USWA, Kaiser had made "a major effort in every one of our facilities" specially to recruit minorities from outside Kaiser to fill skilled craft positions but that these efforts were "fundamentally unsuccessful." (App. 91).

With this background, Bowdle testified as to Kaiser's motivation in agreeing to the program of racial preferences in the 1974 agreement with USWA (App. 91-93, 116):

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[5] App. 89-94. Another witness, Mr. English, the Superintendent of industrial relations for Kaiser at the Gramercy plant, also gave some testimony on this subject, but acknowledged that he did not participate in establishing the national program. App. 64-66, 83-84.

[6] The record in this case shows that an in-plant craft training program for production employees who begin with no craft skills costs the Company in the range of $15,000 to $20,000 per trainee per year over a training period of 2½ to 3½ years. (App. 67-68).

"... I think that prior to the 1974 Steelworkers negotiations, and there have been lots of discussions about this, I think anybody who has been active in the field of equal employment opportunity, affirmative action, recognized that unless employers and unions, jointly or severally, did something creative, in effect, to change the pattern, that there would be no change in the present effects of past discrimination, as it relates to craft occupations, and I think that it was totally consistent with the concept of affirmative action that the Steelworkers and the members of this industry and our company came up with the concept that appeared in our 1974 labor agreement. Something had to be done to change the scene, and the concept of changing seniority systems to broaden opportunities, the concept of aggressively, creatively changing the method by which we manage our human resources, this was not inconsistent with what was going on in the industry. Certainly, it was not inconsistent with the best thinking of the professionals in this field in this country, whether they are with companies, civil rights organizations, Federal government.

"Q. Are you explaining, then, sir why the new procedure for craft training was instituted as part of the 1974 agreement?

"A. Absolutely.

"Q. Could you state, as specifically as you know, and I would assume you know, since this falls within your area of corporate responsibility, what the background reasons were, specifically, for the change in program instituted in the 1974 agreement?

"A. Certainly. In the latter part of 1973, it was very apparent to us, as a company, that if we were going to bring into our industry minorities, we happen to be talking about blacks in this particular area, into the craft occupations, we felt we would have to, as a company, modify our seniority applications, which would give preference, in fact, to minorities. As I indicated, that was not, of course, an original idea in the total concept of affirmative action, but in the latter part of 1973, Mr. Stewart, who is our Vice-President of industrial relations, and I, in meetings with the Steelworkers,

discussed this problem with them. There was certainly a concert of opinion that there was a problem, and one that had to be solved, ...

"Q. Other than compliance with the proper management of human resources and compliance with the company's own policy, and perhaps, the Steelworkers' own policy, were there any practical, pragmatic reasons occurring or taking place that would have added emphasis, perhaps, to the 1974 negotiations?

"A. Oh, certainly, any compliance review that we might have had by any agency, and the two agencies that review us are the Atomic Energy Commission and the Department of Defense, I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing. I suppose, as a company, we could have taken a position that we will advertise in all the black newspapers, we will do this and we will do that, and end up with the conclusion that the availability of qualified minorities in the market place for employment with craft skills is minimal, and end up baying at the moon, as it were. But I don't think the concepts of affirmative action permit a company—I don't think it permitted us, policywise, to merely say we can't do anything about this problem, because it permeates all the things that affirmative action is concerned with."[7]

[7] In answer to a question from the district court as to what he meant by affirmative action, Bowdle stated (App. 109):

"I think the concept of affirmative action, affirmative action is a plan for an employer to develop, to do all of those things that creates opportunities of employment for all citizens. In the process of that, to remove barriers that would make that affirmative action a hollow gesture. It's not a passive thing, there is a difference between equal employment opportunity and affirmative action. Those are not synonymous. Opening the doors of employment to minorities or females, where previously they had been barred from employment, is but one step. To then create an employment environment where they can achieve and compete and perform is where you get into the concept of affirmative action."

• • •

"... It has been a growing revelation, I guess. I don't think, in response, that the pressures, per se, of the Federal agencies responsible, say, for compliance, have brought industry to their knees and forced them to do things that they didn't think, in their good judgment were appropriate responsibilities on their part."[8]

As to the motivation of USWA, Bowdle stated that "they're highly motivated and I would have to say the word creative, in attempting to create a situation of equal employment opportunity and to eliminate the present effects of past discrimination." (App. 96-97).

The district court made the following findings of fact regarding Kaiser's reasons for agreeing to the quota system in the 1974 agreement (USWA Pet. App. A at 5a-6a):

"Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U.S. Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations."

The district court made no finding respecting USWA's

[8] Substantially less than one percent of Kaiser's business is with the government. Kaiser does have substantial business "with other industries that do business with the government." (App. 94.)

reasons for agreeing to the quota system in the 1974 agreement.

No Prior Discrimination

In 1973, the year prior to the new national agreement going into effect, 5 out of 273 craft employees at the Gramercy plant were black. (App. 167). This proportion of black craftsmen, 1.83%, contrasted with the proportion of black production employees at the Gramercy plant at about the same time: 14.8%. (App. 60).

Kaiser's Superintendent of Labor Relations at the Gramercy plant, Dennis E. English, testified that prior to the 1974 program, Kaiser had hired nearly all of the plant's craftsmen from "off the street," (App. 71, 77, 125),[9] and that the proportion of black craftsmen in the plant was the same as the proportion of trained craftsmen who are black in the community from which the plant draws its workforce. (App. 76). English stated that in the years preceding the 1974 agreement, special efforts had been made by Kaiser to recruit black craftsmen to work at the Gramercy plant (App. 62-63):

> "We have done several things. For the past several years, because of what Kaiser as a company wants to do, because of what we have agreed to with the Union, and because of annual compliance reviews with the Government, we have set goals, timetables, to try to achieve a larger percentage of minorities in the crafts.

[9] The lone exceptions, which the court below considered *de minimis* (USWA Pet. App. B at 31a-32a, n. 13), involved 28 production employees with substantial prior craft-related experience or training who were provided a limited on-the-job program to complete their craft training and qualify them as craftsmen. (App. 64-65, 72, 126-127). Such training was much less expensive than the full-blown training program instituted under the 1974 agreement, because the recipients, by virtue of their prior craft-related experience, required a much less extensive training program over a shorter period of time. (App. 75, 95-96; see also note 6, *supra;* pp. 12-13, *infra.*)

> We have advertised in Baton Rouge and New Orleans newspapers. We advertise in minority-only newspapers when craft vacancies become available. We keep separate craft application files, so that any time the craft vacancies comes up, our first thing, we will go to that craft file and we will try to locate qualified black craftsmen, and we always look for the blacks before the whites, and it's quite difficult, because they aren't available.
>
> "Q. Why, then, after such a program, did you have only five or six blacks in the maintenance and skilled crafts, prior to the institution of the '74 agreement?
>
> "A. Once again, we can advertise all we want, and we can keep all the files we want, and look as hard as we can look, and they just aren't available.
>
> "Q. What do you mean by "not available?" They're all working somewhere else?
>
> "A. There are very few that are trained and qualified to begin with, and any black minority today who is qualified is working, because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."

The district court found as fact that Kaiser had not prior to the institution of the 1974 program discriminated against blacks in the hiring of production or craft employees (USWA Pet. App. A, at 5a):

> ". . . The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.
>
> "With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974,

Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen."

The Plan's Operation at Gramercy

Under the 1974 agreement, a full-fledged on-the-job craft training program was established at the Gramercy plant, designed for trainees with no prior craft training or experience. English described the new program as follows (App. 67-68):

> "... When the employee comes to us now, in a training program, he, for the most part, has no training or experience or background whatsoever in mechanical or electrical ability, or whatever the training program is. For that reason, the training program, based upon the individual craft, will last either two and a half or three and a half years, that is, on-the-job training out in the field. At the same time, he gets about four hours of schooling per week by a training supervisor who oversees the training program, and at the same time, he's required to take and pass International Correspondence School home studies, home courses, and these courses, in each of the programs, range, I think, from as low as 40 courses in the air condition repairman training program, to something like 66 courses in the electrical program. So, we have a combination of on-the-job training, classroom instruction, and home study.
>
> "Q. Has this program been evaluated in terms of what it may be expected to cost the company per trainee?
>
> "A. Yeah, we put a figure on that. We feel that on an annual basis, the minimum cost is between 15 and $20,000 per trainee."

Vacancies in trainee positions in this program are filled, to the extent possible, from among competing bidders in the plant's production workforce. (App. 127-128, 145). There is no prior experience requirement for a craft trainee position;

in fact, the only requirement for such a position is physical fitness. (App. 73-74, 127). As provided in the 1974 agreement, the selection of successful bidders for these positions was based strictly on length of plant seniority, subject only to the limitation that at least half of the trainees selected for the program in each "craft family" be black. (App. 73-74, 137, 145, 168-169).[10] That limitation was to prevail until the goal of 39% black craftsmen in each craft family was achieved. The 39% figure was the particular goal set for the Gramercy plant pursuant to the formula adopted under the 1974 agreement (App. 60):

> "... What that agreement tries to do, at Gramercy, and we're one of many plants, we have found, once again using the available statistics, that there are about 39 percent minority employees in the available work force in the two parishes around us. As a result of that, we, in line with that agreement, are striving to obtain, at some future date, a 39 percent minority population in each of the craft families, as is spelled out in that agreement."

See also App. 145, 155.[11]

Between the time the training program under the 1974 agreement went into effect and the time of the injunction issued by the district court, thirteen craft trainee positions were put up for bid and filled at the Gramercy plant. (App. 66, 127-128, 166). These positions were all filled in accordance with the selection criteria established by the 1974 agreement. (App. 72-75, 127-128).

As trainee positions became available they were posted for bidding, with all production employees at the Gramercy plant eligible to bid. For each such posting, a predetermined

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[10] A craft family is a grouping of distinct craft jobs. The craft families used under the 1974 agreement were determined according to "Federal Court Guidelines." (App. 145, 154.)

[11] The record shows that the 39% goal at Gramercy was the highest of all the Kaiser plants; the lowest being a 1% goal. (App. 60-61, 155.)

number of the posted vacancies were allotted to each race (App. 74-75, 127-128); as explained by English, "we stipulated" that within each craft family "the odd number, or the first of any two" vacancies, would be given to a black. (App. 74). The bid lists were then coded for race, creating in effect racially separate seniority lists. (App. 74-75, 127-128, 156-164). Each vacancy set aside for a black was filled from among the black bidders on the basis of plant seniority; and, a like procedure was followed for the filling of vacancies set aside for whites. (*Id.*)

In this manner, by the time of trial, thirteen craft trainee positions had been filled under the 1974 agreement, seven positions by blacks and six by whites. (*Id.*) Each of the seven black trainees secured his position in preference to more senior white bidders as a result of the racial quota requirement in the 1974 agreement. (*Id.*) None of these seven was selected because he was a victim of any prior discrimination against blacks by Kaiser. (App. 81; USWA Pet. App. A at 5a).

INTRODUCTION AND SUMMARY OF ARGUMENT

(1) This case presents, in an entirely distinct legal and factual context, an aspect of the profound social dilemma considered in *University of California Regents* v. *Bakke*, ... U.S. ...., 46 L.W. 4896 (June 28, 1978). That dilemma is how at this time to provide equal opportunity in our society, when (1) historically minorities and women have been denied that opportunity and the effects of that denial cannot be obliterated by "color-blindness," but (2) compensatory efforts on behalf of minorities and women impose competitive disadvantages on other individuals who have committed no wrong.

The dilemma is particularly acute for an employer and union when whites hold most of the skilled craft jobs in a plant and blacks occupy a relatively large proportion of

production or less skilled jobs. This dichotomy is common, and is often not the product of discrimination by the employer whose workforce is affected or by the union representative, but rather, as the courts below found here, results from social forces beyond their responsibility or control. Yet, regardless of the reason, the mere existence of this split may lead to a perception of racial discrimination which is injurious to the morale and efficiency of the employer's workforce and to the cohesiveness of the union's membership.

While USWA has concluded that the benefits of a color-conscious training policy outweigh its costs, we do not argue that our choice is the only one for society as a whole, that it is required by law, or even that it is permitted to Government. But we are emphatic that Congress in Title VII of the Civil Rights Act of 1964, as amended, left employers and unions in the private sector free to take immediate effective steps to secure racial balance in previously all-white job categories. The sole question in this case is whether that reading of the Act "reconstitute[s] the gamut of values current at the time the words were uttered." *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.).

Title VII prohibits "discrimination" on the basis of race, and § 703 (j) in stating the limits of that prohibition provides that the Government may not "require" employers or unions to grant racial preferences to eliminate a racial imbalance. The natural inference is that an employer or union is *permitted* to do so.

That inference is confirmed by the legislative history, as we show by tracing the 1964 Congress' consideration of Title VII and, particularly, its consideration of the Title's application to racial quotas and preferences. This topic was at the forefront of the legislators' attention, and the relevant materials are voluminous. But the lessons are clear.

First, Title VII is separate in origin from the remainder of the Civil Rights Act of 1964. It is the product of the

House Education and Labor Committee; the other titles of the Act are the product of the Kennedy Administration—which because of the intensity of opposition to a fair employment practices provision chose not to include such a provision in its proposed bill—and of the House Judiciary Committee.

Second, Title VII, as enacted in 1964, governed only the private sector. Its sole constitutional predicate was the Commerce Clause; it was viewed by Congress as a further step—albeit one of immense consequence—in the series of measures regulating facets of the private employment relationship.[12] Congress recognized that it was legislating in an area until then unregulated either by the Constitution or by federal law. It was writing social legislation[13] on a

[12] As Senator Humphrey said in his speech "lay[ing] the affirmative case for the bill before the Senate" (110 Cong. Rec. 6528):

> "The constitutional basis for Title VII is, of course the Commerce Clause . . . I think there can be no question that if Congress can prevent discrimination in employment on the basis of membership or nonmembership in a labor union, as it does in the National Labor Relations Act, it can prevent discrimination on the basis of race, color, religion, sex, or national origin. . . ."

Id. at 6548. See also *id.* at 1528 (Representative Celler); 7207-10 (Senator Clark); 8314 (Senator Cooper); 8315 (Senator Hart); 14442 (Senator Javits); 14451 (Senator Keating).

[13] As Sen. Cooper, a supporter, aptly described:

> "So far as the FEP provision of the bill is concerned, I agree with [Senator Stennis] that this is a matter of legislative policy. The right to a job is not a right which is specifically enumerated in the Constitution. But Congress may act if it so chooses, to correct an existing wrong—such as job discrimination. . . . I believe Congress has the authority to enact such legislation, as a matter of policy, under the commerce clause. Whether Congress desires to do so or not and how far such legislation will reach in eliminating practices of discrimination in employment is ultimately a question for the Congress, in its best judgment, and I hope wisdom, to decide." *Id.* at 8314.

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"clean slate," and not, as this Court found with respect to Title VI, attempting to particularize or enforce the general commands of the Fifth and Fourteenth Amendments.[14] The impetus for action was the economic deprivation suffered by blacks and other minorities throughout the Nation—a deprivation which Congress believed attributable in significant part to employment discrimination—and the consequent impact of that deprivation upon the American economy.[15] Similar conditions applicable to all working peo-

On the breadth of Congress' discretion generally in regulating employer-employee relations in private industry see, e.g., *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1; *Railway Employees' Dept.* v. *Hansen*, 351 U.S. 225; *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1.

[14] Title VI, the subject of *Bakke*, was an exercise of federal power over a matter in which the federal government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "program[s] or activit[ies] receiving Federal financial assistance." § 601 of Title VI. Congress was legislating to assure federal funds would not be used in an improper manner. There was in this context no basis for concern over federal intrusion into purely private decision-making. See *infra* at pp. 18-19. Indeed, as the various opinions in *Bakke* point out, Congress assumed that existing Constitutional prohibitions were already applicable to the conduct covered in Title VI.

Congress' own recognition of the importance of distinguishing Titles VI and VII was reflected in its ultimate judgment to add to the bill what emerged as § 604 of Title VI, 42 U.S.C. § 2000d-3, a provision making clear that Title VII, and not Title VI, is to regulate the employment practices of private employers. The sponsor of this provision, Senator Cooper, explained that its purpose was to make clear that "it was not intended that title VI would impinge on title VII." 110 Cong. Rec. 11615.

[15] Senator Clark:

> "Economics is at the heart of the racial situation. The Negro has been condemned to poverty because of a lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life. This is the issue that confronts us on the economic side." 110 Cong. Rec. 13080.

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ple had prompted enactment three decades before of the National Labor Relations Act which forbade discrimination of a different kind, and which served as a model for the drafting of much of Title VII.[16]

Third, from the start, enactment of Title VII—indeed, of the entire Civil Rights bill—depended upon developing a bipartisan coalition of legislators whose philosophies about the desirable extent of government intrusion upon free enterprise varied widely. Because the Southern Democrats were almost unanimously opposed to any bill, there could not be a majority in the House (nor, of course, the two-thirds necessary to invoke cloture in the Senate) without the support of a substantial number of legislators who traditionally resisted federal regulation of private business. For these legislators, Titles II and VII were the most deli-

H. Rep. No. 914, 88th Cong., 1st Sess. (1963), p. 149 (Additional Views of Republican sponsors):

> "The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime."

Senator Humphrey:

> "Discrimination in employment is not confined to any region —it is widespread in every part of the country. It is harmful to Negroes and to members of other minority groups. It is also harmful to the Nation as a whole. The Council of Economic Advisors has recently estimated that full utilization of the present educational attainment of non-whites in this country would add about $13 billion dollars to our gross national product." 110 Cong. Rec. 6547.

See also *id.* at 1639 (Representative Lindsay); 2603-04 (Representative Ryan); 2606 (Representative Gill); 6562 (Senator Kuchel); 7240-41 (Senator Case); 14296-97 (Senator Fong).

[16] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 419 (1975); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 737, 769, 774-775 and note 34 (1976). See also n. 12, *supra.*

cate and difficult provisions in the bill:[17] Title VII in particular presaged a substantial new federal role in the employment decisions of America's businessmen, and in the joint decisions of employers and unions in collective bargaining. With the balance of power in the hands of these legislators, the concern that has consistently provided the limiting principle to employee protective legislation—that government dictation of employment conditions and decisions not undermine the free enterprise and free collective bargaining systems[18]—came to the fore. These legislators demanded, and the more liberal sponsors agreed, that a guiding principle in shaping Title VII be that stated in the Additional Views of the Republican sponsors in the House:

> "[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discriminatory practices."[19]

Fourth, in an effort to exploit the concerns of potential conservative supporters, the opponents of Title VII contended that it would not merely prohibit discrimination on the basis of race, creed, color, sex or national origin; it would, they asserted, require employers to prefer those in previously disadvantaged groups or to hire and promote on

[17] See, *e.g.,* 110 Cong. Rec. 8195, 13087 (Senator Dirksen); 9152 (Senator Allott); 9675 (Senator Aiken); 14190 (Senator Cotton); 14303 (Senator Simpson); 14454 (Senator Mundt); 14483 (Senator Hickenlooper); 14484 (Senator Curtis); 2603 (Representative Hall); 2758 (Representative Gurney); 2759 (Representative Morton); 2782 (Representative Brock).

[18] See, *e.g., Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45-46; *Bus Employees* v. *Wisconsin Board,* 340 U.S. 383, 395-396 n. 21; *Porter Co. v. NLRB,* 397 U.S. 99, 103-106.

[19] H.Rep. No. 914, 88th Cong. 1st Sess., p. 150 (1963). See also 110 Cong. Rec. 1518 (Representative Celler); 15893 (Representative McCulloch); 12593-94 (Senator Clark re Senator Dirksen).

a quota basis. The sponsors of the bill consistently denied that they had an intent to intrude to that extent on private employment decisions or that the bill would have such an effect. To the contrary, they gave assurances that Title VII could in no circumstances be used to impose quotas on unwilling employers or unions, not even by a court after a defendant is found to have violated the Act. In the Senate, these disclaimers proved insufficient to break the filibuster against the bill, and consequently § 703(j) was among the series of amendments proposed by Senator Dirksen to obtain the votes necessary for cloture. Congress thus rejected government imposed quotas, in any form, as intrusions upon private decision-making which were not to be tolerated under the Act.

Fifth, in direct contrast, the conservative sponsors' philosophy of the proper role of government did not incline them toward *forbidding* the adoption by private parties of quotas to eliminate racial imbalance. Congress, to be sure, intended Title VII to extend to white males, but the examples cited during the debates which elicited that assurance were of a piece with the acts of "ugliness," "intolerance," "bigotry," "bias," "prejudice," and "racial preference"[20] which had for so long subjugated blacks and other minorities.[21] The lengthy debates over the question whether Title

[20] See, *e.g., id.* at 6000 (Senator Humphrey); 4757 (Senator Humphrey); 14297 (Senator Keating); 8350 (Senator Proxmire); 2783 (Representative St. Onge).

[21] Examples were cited during the debates of black unions excluding whites from membership, 110 Cong. Rec. 2551; black employers hiring only black employees, *id.* at 2550, 2552, 2558-59, 2562, 2782, and even white employers hiring only black employees (restaurants in the South with exclusively black waiters, *id.* at 2726; and railroads with exclusively black porters, *id.* at 2557). Rep. Celler stated the vice in these practices: if a black union excludes whites it is "exactly the same" as a white union excluding blacks. "Both are clear examples of discrimination. It works both ways," *id.* at 2552.

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VII would *require* quotas provides ample evidence from which a clear Congressional intent is discernible not to *forbid* private decisions to use quotas to eliminate racial imbalance. In the House, every pertinent legislative statement confirms that Title VII neither requires nor forbids racial balancing. In the Senate, some of the liberal sponsors voiced the view early in the debate that employment decisions must always be colorblind, but once the conservative sponsors drafted and introduced § 703(j) every subsequent statement (including the liberals') was consistent with the House view.[22]

Sixth, the extensive debate on voluntary racial balancing to cure *de facto* segregation in school systems which took place under Title IV influenced the shape of the legislative decision under Title VII. Some school systems had opted for that course in 1964, and in deference to local decision-making Congress determined neither to require nor to forbid that practice. That precedent was repeatedly cited in the debates as a parallel to the decision under Title VII reflected in the wording of § 703(j).[23]

Finally, while Congress re-examined Title VII in 1972, and amended it in certain unrelated respects, nothing which occurred in 1972 alters the construction which the language of § 703(j) and the legislative history compel: that Title VII does not forbid the adoption by private parties of quotas to eliminate racial imbalance.[24]

(2) The detailed development of the points just outlined

Rep. Corman added that permitting black employers to hire black salesmen because their customers are black would require permitting white employers to hire only whites in the same circumstances—perpetuating the very attitudes the bill was designed to erase, *id.* at 2559; see also *id.* at 2563 (Representative Roosevelt).

[22] See pp. 29-66, *infra.*

[23] See pp. 66-70, *infra.*

[24] See pp. 74-75, *infra.*

establishes that Title VII does not prohibit private parties from adopting quota programs of the type at issue here. On that basis the decision of the court below should be reversed. We believe that no other issue is presented. But we meet two alternative theories which the Government, and others, have sought to insert into this case: First, that even if programs of the type here are generally forbidden by Title VII, there is nevertheless a zone in which private parties are permitted to adopt such programs, a zone which is derived from the presumed power of courts to order quotas as remedies in Title VII cases. Second, that even if private voluntary programs such as that here violate Title VII, employers and unions may nevertheless be authorized to undertake such programs by the Office of Federal Contract Compliance (OFCC).

Obviously, if we are correct in our basic position that Congress intended to permit private parties to adopt quotas to eliminate racial imbalance, the question whether there is, as a result of an assumed power of courts to order quotas, some zone in which private quota programs, otherwise violative of Title VII, are permissible, never arises. And, if our position is wrong, it would still be inappropriate to consider this alternative theory here because the factual predicate for the theory is not presented on the record of this case.

On the merits, the theory is flawed in that Congress expressly rejected its major premise. Floor leaders and principal supporters of Title VII in both Houses assured their fellow members in unambiguous terms that under no circumstances would Title VII empower courts to direct defendants to adopt racial quotas, even in cases where discrimination in violation of the Act is proved. The language of the 1964 and 1972 Acts confirms those assurances.

If our basic position is correct, there is no reason, either, to consider the second alternative theory noted. For if Title

VII does not prohibit the kind of program here at issue, authorization from OFCC would be unnecessary. And if the position for which we contend is not correct, then all quota programs of the type at issue here violate Title VII. The OFCC cannot, by virtue of power derived from an executive order, make legal what Congress has made illegal.

ARGUMENT

I. THE KAISER-USWA SELECTION PROGRAM DOES NOT VIOLATE TITLE VII.

This case turns entirely upon the proper construction of § 703 of Title VII, which must be drawn from the statutory language and the legislative history. Before turning to these materials, we pause to demonstrate that the question presented here is entirely open.

This question was not resolved by this Court's holding in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), that Title VII forbids racial discrimination against white male employees just as it does discrimination against minorities and women. The *McDonald* Court "emphasized" that it was not deciding the lawfulness of "affirmative action programs" (*id.* at 281 n. 8):

> "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required *or otherwise prompted.*" (Emphasis added.)

Nor was the issue in this case resolved by this Court's ruling in *Bakke, supra,* that Title VI of the Civil Rights Act of 1964 forbids a state university which receives financial assistance from the federal government from reserving a certain number of student admissions solely for minority students. Title VI and Title VII are not interchangeable; indeed, as this brief shows, they differ in ways critical to the resolution of the question now before this Court.

A. The Statutory Language

Section 703 of Title VII in its entirety "delineates which

employment practices are illegal and thereby prohibited and which are not." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758 (1976). The two subsections in point here are (d) and (j), which provide:

> "(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."[25]
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> • • •
>
> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may

[25] While subsection (d) is specifically directed to on-the-job training programs, subsections (a) and (c)(3), which are more general in coverage, may also be applicable here:

> "(a) It shall be an unlawful employment practice for an employer—
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> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
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> • • •
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> "(c) It shall be an unlawful employment practice for a labor organization—
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> • • •
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> "(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

> exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703(d) standing alone does little to advance the inquiry since its operative words are "discriminate against any individual . . . in admission to . . . any [training] program," and "[t]he concept of discrimination is susceptible to varying interpretations." *Bakke, supra,* 46 LW at 4900 (opinion of Justice Powell). But § 703(d) does not stand alone. And, §§ 703(d) and (j), read together, state that Title VII, in prohibiting discrimination, does not *"require"* an employer or union to grant a racial preference to eliminate a racial imbalance. This articulation of Title VII's basic norm—an articulation which was arrived at through a "meticulous" drafting process in which the drafters "tried to be mindful of every word, of every comma, and of the shading of every phrase"[26]—strongly suggests that an employer or union is *permitted* to grant such a preference.

In contrast to §§ 703(d) and (j), § 601 of Title VI, the provision applicable in *Bakke,* states:

> "No person in the United States shall, on the ground of race, color, or national origin, *be excluded from participation in,* be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

[26] 110 Cong Rec. 11935 (Senator Dirksen, explaining the process by which the amendments in the Dirksen-Mansfield compromise, including § 703(j), were drafted). See also *infra,* pp. 57-58.

Relying on the portion of § 601 in italics, Mr. Justice Stevens' opinion in *Bakke* reasoned:

> "The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted. • • • •
>
> "Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds." (46 LW at 4934-35 (footnote omitted)).

The very different content of the basic prohibitions of Title VI and VII is not a mere happenstance; it reflects their different origins, different histories, and the different concerns addressed.

B. The 1964 Legislative History

1. The Genesis of the House Bill

Vass, *Title VII: Legislative History*, 7 Boston College Industrial and Commercial Law Review, 431, 433-436 (1966), succinctly states the background of Title VII:

> "At the outset of the Eighty-eighth Congress various Senators and Representatives submitted a plethora of civil rights bills. . . . [including] . . . H.R. 405 entitled 'A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age' . . . the nominal ancestor of Title VII. It was introduced in the

> House by Mr. Roosevelt of California . . . was promptly referred to the House Committee on Education and Labor and [f]ollowing extensive hearings, . . . [was] reported . . . with amendments . . .
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> • • •
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> ". . . [Thereafter] the administration's comprehensive bill on civil rights, H.R. 7152, was introduced in the House by Representative Celler of New York [and] . . . was promptly referred to the Committee on the Judiciary (and thence to Subcommittee No. 5). The bill as introduced contained no compulsory FEP provisions respecting private employment . . . During the Subcommittee hearings many witnesses, including George Meany, President of the AFL-CIO, Walter P. Reuther, President of the United Automobile Workers, AFL-CIO, and Sidney Zagri, legislative counsel for the International Brotherhood of Teamsters, testified in favor of such provisions. Mr. James Roosevelt of California, who was Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor . . . testified as a co-sponsor of H.R. 7152 [in favor of] . . . amending H.R. 7152 by incorporating therein the provisions of H.R. 405, which . . . was pending in the Rules Committee. . . .
>
> "At the conclusion of the hearings the Subcommittee met in executive session. . . . As a result of its deliberations, H.R. 7152 was amended by striking out all after the enacting clause and inserting in lieu thereof an amendment in the nature of a substitute. . . . [which] included as Title VIII thereof the provisions of H.R. 405 as reported by the House Committee on Education and Labor. The full Judiciary Committee in turn also struck out all after the enacting clause in H.R. 7152 as recommended by its Subcommittee and adopted an amendment in the nature of a substitute. . . . [which] contained as Title VII thereof FEP provisions different in certain respects from those set forth in H.R. 405 and included in the bill recommended by Subcommittee No. 5.
>
> "H.R. 405, as reported by the House Committee on Education and Labor and included as Title VIII of H.R. 7152 as recommended by Subcommittee No. 5 provided for an administrative agency, comparable to the NLRB, with the authority to hold hearings and issue

cease-and-desist orders, enforceable in court, after a finding of discrimination in hiring or union membership....

". . . Title VII of the Judiciary version differed radically from the Education and Labor proposal in that the Judiciary version gave the Equal Employment Opportunity Commission no enforcement powers as such but simply the power to bring a civil action against the discriminator in the event a settlement by agreement could not be secured."

What did not change significantly in this evolution is the language of the basic prohibition as drafted in the initial Roosevelt bill. And, with two exceptions, the bill reported out by the House Judiciary Committee contained §§ 703 (a)-(d) as they were ultimately enacted. Those exceptions are the House floor amendments adding the prohibition against sex discrimination and adding coverage of "retraining, including on the job training." That bill did *not* contain § 703(j). Its enforcement procedure differed from the bill ultimately enacted in that it empowered the EEOC to institute lawsuits. Its remedial section (then numbered § 707 (e)), was identical to § 706(g) in the bill ultimately enacted, except for the final sentence of that section which was changed on the House floor.[27]

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[27] As reported out by the Judiciary Committee, the last sentence read:

"No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged *for cause*." H. Rep. No. 914, *supra*, p. 12 (§ 707(e)). (emphasis added)

As amended and ultimately enacted, that sentence provides:

"No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)*." § 706(g) (emphasis added).

2. The Judiciary Committee Report

The Judiciary Committee's Report simply described the provisions of Title VII without elaboration, and thus contained no discussion of the bill's treatment of quotas. However, the opponents of the bill on the Committee, in their Minority Report, contended that the bill would empower the federal government to force employers and unions to adopt quotas to "racially balance" their workforces and memberships. The Minority's analysis began with this preliminary observation, which was italicized in the Report:

"Throughout this entire report the construction we have placed upon the provisions of the reported bill are based upon what we believe will be advanced by the administration, evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government. We do not mean to say that such construction is necessarily correct or that the powers granted are constitutional. Broad, obscure, and undefined wording is repeatedly used in the bill."[28]

The Minority Report asserted that the Department of Labor had been demanding racial balancing in apprenticeship programs, and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . ."[29] The Minority Report then proceeded to list "examples" of the effects which passage of the bill would have:

"Under the power conferred by this bill, [the farmer] may be forced to hire according to race, to 'racially

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[28] H.R. Rep. No. 914, 88th Cong. 1st Sess. 64 (1963) (hereinafter "H. Rep.").

[29] *Id.* at 68.

balance' those who work for him in every job classification or be in violation of Federal law."[30]

• • •

"[If a] union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then, go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law."[31]

• • •

"[I]f a contractor, for example, has been adjudged guilty of discrimination [he] must, therefore, hire 100 or 1,000 workers of a given race—in preference to all others—[until] his job becomes racially balanced . . ."[32]

• • •

"If [an employer's] firm is not 'racially balanced,' . . . he has no choice, he must employ the person of that race which, by ratio, is next up, even though he is certain in his own mind that the [person] he is not allowed to employ would be a superior employee."[33]

• • •

"If a job applicant can write and there is an opening and he is of the race called for to balance the make-up of the staff, that person must be employed in preference to someone of another race."[34]

From the cited examples, the Minority Report drew these conclusions:

"That such mandatory provisions of law approach the ludicrous should be apparent. That this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied."[35]

These contentions in the Minority Report led the Republican sponsors of the bill on the Judiciary Committee, who

[30] *Id.* at 69 (italics omitted).

[31] *Id.* at 71.

[32] *Id.* at 72.

[33] *Id.* at 72-73.

[34] *Id.* at 73.

[35] *Id.* at 73.

were to play a critical role throughout the legislative process, to state the following in their "Additional Views":[36]

"It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathetical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor unions must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification."[37]

3. The House Floor Debate

When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" which had been leveled at the bill:[38]

"It has been claimed that the bill would deprive employers, workers, and union members of their right to be free to control their business affairs and their membership. Specifically, the charge has been made that the Equal Employment Opportunity Commission to be established by Title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'federal

[36] The signers of these Additional Views were Representatives McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell.

[37] *Id.* at 150.

[38] 110 Cong. Rec. 1518.

inspector' could order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong. The Equal Employment Opportunity Commission would be empowered merely to investigate specific charges of discrimination and to attempt to mediate or conciliate the dispute. It would have no authority to issue any orders to anyone.

"In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. The employer would have ample opportunity to disprove any of the charges involved and would have the benefit of the protection of all the usual judicial procedures.

"No order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.

"*Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.* The statement that a federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous . . .

• • •

"It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by *requiring* the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." [39]

Representative Lindsay, one of the authors of the "Additional Views" in the Report, said:

"This legislation . . . does not, as has been suggested

[39] 110 Cong. Rec. 1518 (emphasis added).

here—both on and off the floor—force acceptance of people in . . . jobs . . . because they are Negro. It does not impose quotas or any special privileges . . . There is nothing whatever in this bill about racial balance as appears so frequently in the Minority Report of the Committee.

"What the bill does do is prohibit discrimination because of race or religion . . .

"Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself . . ." [40]

Representative Minish, a supporter, added:

"Under Title VII, employment will be on the basis of merit, not race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job. The Title is designed to utilize to the fullest our potential work force, to permit every worker to hold the best job for which he is qualified. This can be done by removing the hurdles that have too long been placed in the path of minority groups who seek to realize their rights and to contribute to a full society." [41]

A number of opponents then repeated the theme of the Minority Report, that Title VII would require employers and unions to engage in racial balancing. As Representative Alger put it, Title VII attempts to "enforce preferential treatment for the Negro by making jobs available to him for which he is not qualified because of injustices practiced upon his forebears." [42]

Representative Healey, a supporter, replied:

"Opponents of the bill say that it sets up racial

[40] 110 Cong. Rec. 1540.

[41] 110 Cong. Rec. 1600.

[42] 110 Cong. Rec. 1645; see also, 110 Cong. Rec. 1620 (Roberts); 1633 (Dowdy).

> quotas for job[s] . . . The bill does not do that. It simply requires . . . that industries involved in interstate commerce not deny a qualified person the right to work because of his race or religion."[43]

Representatives Dowdy and Ashmore renewed the contention that Title VII would require racial balancing.[44] Representative Goodell interjected:

> "As I understand the gentleman's position, I do not think it can go unchallenged. There is nothing here as a matter of legislative history that would require racial balancing . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color."[45]

With no further discussions of quotas, the House passed the entire bill, including Title VII, and sent it to the Senate. Subsequently, the Republican sponsors in the House prepared a memorandum describing the bill as passed. In pertinent part, that memorandum stated:

> "The Civil Rights Bill, as passed by the House, does not in any way *require, reward,* or *encourage:* (1) 'open occupancy' in private housing, (2) the transfer of students away from the neighborhood schools to create 'racial balance', or (3) the imposition of racial quotas or preferences in either private or public employment of individuals.
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> • • •
>
> "*Upon conclusion of the trial,* the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members."[46]

[43] 110 Cong. Rec. 1994.

[44] 110 Cong. Rec. 2557 (Dowdy); 2558 (Ashmore).

[45] 110 Cong. Rec. 2558.

This memorandum drew two conclusions as to the meaning of Title VII: Title VII did not "permit" court-ordered quotas, and it did not "require, reward, or encourage" privately adopted quotas. No sponsor in the House had said anything inconsistent with either proposition. A copy of this memorandum was transmitted to Senator Kuchel, the Republican manager of the bill in the Senate, who introduced it at the close of his opening speech in support of the bill in the Senate (see p. 41, *infra*).

4. The Senate

The Senate, after lengthy debate, decided to take up the bill directly, without referring it to a Committee, and consequently there is no Committee Report in the Senate.

a. The Debate on Taking Up the Bill.

During the 17-day debate over whether the bill should be sent to Committee, Senator Hill made a lengthy speech attacking Title VII. A major theme of that speech was that the bill would install quota systems throughout American employment.[47] This theme was elaborated by Senator Robertson:

> "An employer will not be free to make selection as to individuals he prefers to hire. This Title suggests that hiring should be done on some percentage basis in order that racial imbalance will be overcome. It is contemplated by this Title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city, and 15,000 whites, an employer with 25, would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20

[46] *Id.* at 6565-66 (emphasis added).

[47] *Id.* at 4761, 4764, 4767.

> colored employees, he would have to fire 10 of them in order to ractify the situation. Of course, this works the other way around where whites would be fired. The impracticability and unworkability of this Title seems self-evident."[48]

Senator Humphrey responded:

> "The bill does not require that at all. If it did, I would vote against it . . . [V]oluntary compliance procedures must be used. There is no percentage quota."[49]

Later that day, Senator Humphrey introduced a newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections to Title VII." In material part, it stated:

> "Objection: The law would empower federal 'inspectors' to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .
>
> "Reply: The bill requires no such thing. The five-member Equal Employment Opportunity Commission that would be created would have no powers to order anything. It can seek voluntary compliance with the objective of nondiscrimination in hiring.
>
> "If compliance is not forthcoming, the Commission may take its case to a federal judge, leaving it to him to decide if a violation did in fact take place and what the remedy should be. The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of race or religion. Similarly, the law will have no effect on union seniority rights."[50]

On March 17, responding to a political advertisement charging that the bill would give the federal government the power to run America's businesses, Senator Humphrey, on the floor of the Senate, stated:

[48] *Id.* at 5092.

[49] *Id.* at 5092.

[50] *Id.* at 5094.

> "Title VII . . . will prohibit discrimination in employment . . . It does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race, color, religion, national origin or sex. It does not interfere with job seniority; nor does it in any way authorize the federal government to prescribe, as the advertisement charges, a 'racial balance' of job classifications or office staffs or 'preferential treatment of minorities'.
>
> • • •
>
> [N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[51]

On March 23, answering a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

> "There is no enforced quota. The quota system which has been discussed is nonsense. Everyone knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.
>
> "There would be no Attorney General referred to in the bill with the powers of the Federal Government to smack down some poor, unsuspecting employer . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful."[52]

b. The Debate on the House Bill.

On March 26, 1964, after 17 days of debate, the Senate voted to reject the motion to refer the bill to Committee,[53] and on March 30, the formal debate on the bill began. Senators Humphrey and Kuchel, the co-managers of the entire

[51] *Id.* at 5423.

[52] *Id.* at 6001. Senator Smathers then secured Senator Humphrey's acknowledgement that under the bill an employer would have to obey a court order requiring him "to take affirmative action, including reinstatement of employees." *Ibid.*

[53] *Id.* at 6455.

Civil Rights bill in the Senate, undertook "to lay the affirmative case for the bill before the Senate."[54] Senator Humhprey began his discussion of Title VII by declaring:

> "At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignment. They are treated unequally in some labor unions and are discriminated against by many employment agencies.
>
> "No civil rights legislation would be complete unless it dealt with this problem. Fair treatment in employment is as important as any other area of civil rights."[55]

Senator Humphrey then presented an extensive brief on the economic consequences—in terms of underemployment and lower wages—suffered by blacks "in every part of the country."[56] He cited statistics showing that "the relative position of the Negro worker is steadily worsening."[57] He saw this not as a sign that "prejudice is increasing," but rather as a reflection of automation's "gradually doing away with the unskilled and semi-skilled jobs which have been traditionally open to Negroes, while the Negro is being excluded, both by lack of training and by discrimination, from the new jobs which are being created."[58]

Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedies available to a court:

> "The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees

[54] *Id.* at 6528.

[55] *Id.* at 6547.

[56] *Id.* at 6547.

[57] *Id.* at 6547.

[58] *Id.* at 6548.

> and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title.* This is stated expressly in the last sentence of Section 707(e) [enacted, without change, as §706(g)] which makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that *individuals* may not be discriminated against because of race, religion, sex or national origin.
>
> • • •
>
> *"Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> "That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.
>
> "In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination."[59]

At the close of his speech, after describing the other titles of the bill, Senator Humphrey returned briefly to the subject of employment quotas:

> "It is claimed that the bill would require racial

[59] *Id.* at 6548 (emphasis added).

quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions.

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted."[60]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

"If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without backpay, which may be appropriate.

• • •

"Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.*"[61]

[60] *Id.* at 6553.

At the close of his speech, Senator Kuchel introduced the memorandum prepared by the Republican sponsors in the House, describing the bill as enacted by the House, which we have quoted earlier, *supra*, pp. 34-35. (That memorandum declared that Title VII does not "in any way require, reward, or encourage" the private adoption of employment quotas, and does not "permit" employment quotas to be ordered by courts.)[62]

Each of the next several days was devoted to the sponsors' exposition of a particular title of the bill. On April 8, 1964, the speeches in support of Title VII were made by Senators Clark and Case, the bipartisan "captains" for Title VII.

Senator Clark began his speech by explaining the peculiar

[61] *Id.* at 6563 (emphasis added). Later in the same speech, addressing the impact of Title VII upon seniority, Senator Kuchel made the following statement:

"Neither would seniority rights be affected by this Act. Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters, the Constitution, and the bill now before us drawn to conform to the Constitution, is color blind."

Id. at 6564. This is the *only* reference we have found, throughout the lengthy debates in both Houses, suggesting that Title VII was "drawn to conform to the Constitution." In light of the innumerable statements of other sponsors that Title VII was predicated exclusively upon the Commerce Clause, we do not believe it would be proper here—as a majority of the Court found it to be with respect to Title VI in *Bakke*—to draw the meaning of Title VII from either the Fifth and Fourteenth Amendments or Congress' contemporaneous understanding of those Amendments. See *supra*, p. 17.

[62] *Id.* at 6565-66.

parliamentary posture in which the Senate found itself. The Senate could not afford to amend the House bill unless it knew in advance that the House would concur in every amendment. For a vote of non-concurrence by the House would expose the Senate to a second filibuster—and it was going to be hard enough to invoke cloture once. This meant that the Senate "dare not" make any changes that Representative McCulloch—the principal Republican sponsor in the House—would not approve. Representative McCulloch was "to some extent the . . . 'czar' of the Senate, since we are in a parliamentary situation where we do not dare adopt any amendment which has not received the categorical approval of Representative McCulloch." (Representative McCulloch, as the principal Republican sponsor in the House, was the first signer of the "Additional Views" in the House Report, *supra*, pp. 30-31, and of the memorandum quoted *supra*, pp. 34-35.) Accordingly, while Senator Dirksen wanted amendments to Title VII, some of which were acceptable to Clark, the sponsors would have to clear them with the House before considering their adoption.[63]

Senator Clark then turned to the need for Title VII, and presented a brief, similar to Senator Humphrey's nine days before, on the economic plight of America's blacks.[64] The only statement about quotas made by Senator Clark in his speech was the following:

> "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[65]

But a series of written materials he introduced, designed to answer some of the erroneous charges about the bill, went further. A Justice Department letter, answering Senator Hill's charge that Title VII "would impose the requirement of racial balance," declared:

[63] *Id.* at 7203, 7215.

[64] *Id.* at 7204-05.

[65] *Id.* at 7207.

> "There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all."[66]

Senator Clark also introduced an interpretative memorandum for himself and Senator Case, which stated:

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race."[67]

Finally, Senator Clark introduced written answers which he had prepared to certain "objections" which had been voiced to Title VII. Two items in this document were:

> "Objection: Many employers will lean over backwards to avoid discrimination, and as a result will discriminate against other employees, thereby increasing case volume.
>
> "Answer: . . . [T]he Commission has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the act, including the obligation not to discriminate against whites.
>
> • • •
>
> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

[66] *Id.* at 7207.

[67] *Id.* at 7213.

"Answer: Quotas are themselves discriminatory."[68]

Senator Case, who made the other major speech on April 8, in support of Title VII, did not allude in terms to the quota issue. In describing the features of the bill, he did, however, provide this description of what eventually became the last sentence of § 706(g):

> "No order of the court under this title may require the . . . hiring . . . or promotion of an individual . . . if the individual was . . . refused employment or advancement . . . for any reason other than the discrimination prohibited by this title."[69]

Senator Ervin asked:

> "The bill is designed to compel employers to hire nonwhites in specific cases . . . is it not?"[70]

Senator Case responded:

> "The bill would do only one thing. It would make it unlawful for a person to discriminate against an individual in regard to employment—hiring, firing, promotion, or any other matter—because of race. It does not require anybody to hire a particular individual."[71]

On April 9, 1964, the sponsors having completed their presentation of the bill, the opponents gained the floor and the filibuster was under way. Senator Robertson made the first speech for the opponents. At one point, he described the advice he had given to a businessman who was his constituent: "you could be required to have a certain percentage of . . . Negroes among the employees in your business, once title VII was enacted into law."[72] This statement triggered the following colloquy:

"MR. HUMPHREY: I feel sure that the Senator

[68] *Id.* at 7218.

[69] *Id.* at 7243.

[70] *Id.* at 7253.

[71] *Id.* at 7253.

[72] *Id.* at 7418.

from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.

"MR. ROBERTSON: Not only am I going to intimate it, I am going to charge it; and I am also going to point it out in detail.

"MR. HUMPHREY: Does the Senator from Virginia say that clearly would be required by this part of the bill?

"MR. ROBERTSON: I told that businessman it would be possible, and if it would be possible, such a provision should not be included.

"MR. HUMPHREY: But can the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?

"MR. ROBERTSON: What does 'discrimination' mean? If it means what I think it does, and which it could mean, it means that a man could be required to have a quota or he would be discriminating. The question comes down to what is meant by 'discrimination' and the framers of the bill will not tell us.

"In the debate in the House it was frankly admitted that quotas were possible under the very definition of what is 'discrimination.'

• • •

"MR. HUMPHREY: Can the Senator point out any place in the language of the bill that calls for quotas or a percentage of employees based upon race, creed, color, or national origin? The Senator can say 'Yes' but what is 'discrimination'? It is like my asking the Senator about atomic energy, and he replies 'yes, but how about ice cream cones?' Really, it is a non sequitur. The Senator is a man of logic and reason. I ask him a simple question, We will get around to a definition of 'discrimination.' But what about percentages and quotas?

"MR. ROBERTSON: The bill has been framed by

some very clever lawyers. They were so clever that they even fooled my distinguished friend from Minnesota . . .

• • •

"MR. HUMPHREY: I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.

"MR. ROBERTSON: . . . [I]t is proposed to write some vague language in this title VII and the Senator asks, 'Where do you find quotas in it?' I find it in the possible ruling of a bureaucrat and then confirmed by a court that does not operate in a way that I approve."[73]

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[74] It is apparent from the numerous references to the Newsletter during the debates that it was widely read by Senators.[75] The April 11, 1964 issue of the Newsletter, two days after the Humphrey-Robertson dialogue, contained a "brief description of Title VII," which included the following:

"Under title VII, not even a Court, much less the

[73] *Id.* at 7418-20.

[74] *Id.* at 5042.

[75] The initiation of the Newsletter caused a minor controversy among supporters and opponents of the bill, reflected in the colloquy between Senators Stennis, Humphrey and Javits, *id.* at 5042, 5044. The Newsletter remained a popular item, see *id.* 5046 (Humphrey); 5079 (Humphrey); 7474 (Humphrey); 8369 (Bayh); 8912 (Williams); 9105 (Clark); 9870 (Case); 10622 (Humphrey); 12210 (Humphrey); 14464 (Hart).

Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title."[76]

On April 13, Senator Smathers, in the course of a lengthy speech, declared that Title VII "would lead to a quota system eventually."[77] The following ensued:

"MR. HUMPHREY: Will the Senator name one state in which there is a quota system under FEPC?

"MR. SMATHERS: There has not been one yet, but that is what is being aimed at . . . [An employer] will protect himself by hiring a certain number of colored people in order to keep the majesty and might of the Federal law and its large bureaucracy off his neck.

• • •

"MR. HUMPHREY: Would the Senator from Florida be more pleased if we included in the bill an amendment which provided that there should be no quota system?

"MR. SMATHERS: I think the bill would be improved.

"MR. HUMPHREY: That might be a good Amendment. It is only to satisfy those who are doubters, because if we do not expressly provide for a quota system, obviously it will not be included. But since we do provide in other sections of the bill—for example, in title VI—that the withdrawal of Federal funds should not relate to insured activities or guarantees, we might very well want to include that sort of restraint in the bill.

"I have heard this argument made again and again. If there is that legitimate fear, which I do not see in the bill, but which others may see, perhaps we ought to remedy the alleged defect. I do not believe in a quota system."[78]

[76] *Id.* at 14465.

[77] *Id.* at 7800.

[78] *Id.* at 7800.

On April 16, Senator Dirksen announced that his "principal interest" was "in title II [public accommodations] and in title VII," which he felt required amendment.[79] These were the only two titles of the bill aimed directly at private enterprise.

On April 20, Senator Smathers, in the course of a lengthy speech, repeated his expectation that an employer "in order to keep the weight of the Federal Government off his neck and keep himself out of court, . . . must finally establish a sort of quota system to protect himself at all times, so that he will not have to spend all his time and resources in court proving that he does not discriminate."[80] The following colloquy ensued:

> "MR. ALLOTT: How does the Senator interpret [Title] VII in terms of the fact that an employer would have to live up to a quota? I completely agree with the Senator that if an employer were *required* to employ a person on the basis of a quota, there would be no justification for that procedure under the American system. If people *must* be employed on the basis of a percentage, there is no basis for such a procedure under the American system of free enterprise.
>
> "Where in the bill does the Senator find justification for the statement that persons would have to be employed on the basis of a quota or percentage? I will pick up the bill and follow through with him, if the Senator wishes.
>
> "MR. SMATHERS: It is not written in the bill that there must be a quota system, but the net effect of the adoption of the proposed law would be that employers, in order to keep themselves from being charged with having discriminated, would, in time, have certain people working for them to meet the color qualifications, the religious qualifications, the creed qualifications, and so on.
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> • • •

[79] *Id.* at 8195.

[80] *Id.* at 8500.

> "The bill does not contain any provision about a quota system. As a matter of fact, the other day the Senator from Minnesota said that he was so much against the quota system that, if it would help the Senator from Florida, he would be for a provision in the bill against quotas, as I recall. I believe it would be helpful to have such a provision in the bill.
>
> "But what is going to happen? . . . I am saying to the Senator from Colorado that that will be the result, although I agree that the bill does not provide for it.
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> • • •
>
> "MR. ALLOTT: I am happy to learn that the Senator agrees that the bill does not provide for it.
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> • • •
>
> "The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.
>
> "I do not contend that any man should be employed because of his race, his religion, his color, or his ethnic origin; but there is nothing in the bill, unless one reads into the language a right that is not there, which provides that one *must* employ a man because of his race, color, religion, or national origin. If the Senator finds in the bill language to the effect that an employer must do that, I shall be very much interested to learn about it.
>
> "MR. SMATHERS: As I said earlier I do not contend that the bill provides that there *shall* be a quota system or percentages. In some instances I believe the bill avoids what might be unfortunate consequences."[81]

On April 21, Senator Sparkman, in the course of a lengthy speech, declared that Title VII would require employers to "employ a certain percentage of Puerto Ricans."[82] Senator Keating interrupted:

> "Have not the Senator from Alabama and the Sen-

[81] *Id.* at 8500-01 (emphasis added). Senator Allott was one of the Republican sponsors.

[82] *Id.* at 8618.

ator from Mississippi already stated that the bill does not provide in any way for quotas of any kind?'' [83]

Senator Sparkman replied:

> ''Yes . . . The bill does not provide for quotas. But most likely, as the agents of the Equal Employment Opportunity Commission contact employers, questions will arise.'' [84]

Senator Sparkman explained that these agents would point to the underrepresentation of minorities as potential evidence of discrimination, and would say that the employer ''ought'' to have the requisite percentage. Thus, in practice,

> ''almost invariably there would be a movement toward a kind of quota system. Such a tendency has already been observed under the President's voluntary employment opportunities program. Employers have been threatened with the loss of their government contracts if they did not comply.'' [85]

To which Senator Keating responded:

> ''Of course, improper administration of the law is a question that may be encountered at any time. I was speaking about the provisions of the bill.'' [86]

Senator Sparkman replied: ''The Senator is correct.'' [87]

Senator Keating then asked:

> ''Is the Senator aware that despite his assertion, and despite the recognition that quotas are not provided in the bill, literature is going out all over the

[83] *Id.* at 8618. We have been unable to locate acknowledgments by an Alabama or Mississippi Senator to this effect, but Senator Smathers had done so (*supra*, p. 49) and it would not be surprising if other opponents had made similar acknowledgments off the floor of the Senate.

[84] *Id.* at 8618.

[85] *Id.* at 8618.

[86] *Id.* at 8618.

[87] *Id.* at 8618.

> country representing that the bill lays down quotas for employers?'' [88]

Senator Sparkman had not seen such literature, but he reiterated that *in practice* the bill would lead to quotas:

> ''For example, I was referring to what was done in the Post Office Department. I was going by what was done under the President's voluntary advisory program on equal employment opportunities. The Senator knows the program of which I speak. I was going by the recommendations that the Civil Rights Commission has made.
>
> ''So I say that in practical application the procedure would not be called a quota system, but it would represent virtually that to me. Certainly the suggestion will be made to a small business that may have a small Government contract—perhaps $25,000 or $30,000 Government contract—that if it does not carry out the suggestion that has been made to the company by an inspector, its Government contract will not be renewed. It will not get another contract.
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> • • •
>
> ''. . . That is the reason I have said that when it comes to the practical application of the program, even though quotas are not required, some kind of quota system will be used.'' [89]

On April 23, Senator Williams of New Jersey, a supporter of the bill, gained the floor during the ''morning hour'' and responded to a number of political advertisements charging, *inter alia*, that the bill would require quotas:

> ''Mr. President it is also charged that employers, including farmers, will have to hire employees according to race to establish racial balance in every job classification; and it is said that quotas will be imposed,

[88] *Id.* at 8618. Senator Keating was a Republican sponsor. He was one of the principal advocates of the provision in Title IV of the bill permitting (but not requiring) racial balancing by local school authorities (*infra*, p. 67).

[89] *Id.* at 8618-19.

forcing businessmen to hire incompetent and unqualified personnel.

"Now I turn to the fact: For some reason the fact that there is nothing whatever in the bill which provides for racial balance or quotas in employment has not been understood by those opposed to civil rights legislation. They persist in opposing a provision which is not only not contained in the bill, but is specifically excluded from it. Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense.

• • •

"Finally, let me attempt to put to rest the wholly spurious argument that H.R. 7152 would establish compulsory employment quotas, by pointing out certain relevant facts which should demonstrate the baseless nature of this objection to the bill. The Supreme Court has ruled, in numerous cases, that racial discrimination in the selection of juries is unconstitutional. In case after case, where it has been demonstrated that Negroes have been systematically excluded from serving on juries, the Supreme Court has declared such practice a violation of constitutional procedure. No individual may be prevented from serving on a jury on account of his race. But this does not mean that every jury must contain a Negro. The Court's decision does not establish quotas for juries. Neither does the Court demand that prospective Negro jurors be given preferential treatment over prospective white jurors when a panel is chosen. In fact, the Supreme Court has flatly rejected the notion that there must be racial quotas

for juries. In *Akins* v. *Texas*, 325 U.S. 398 (1945), the Court ruled that there need not be any direct correlation between the number of Negroes on a particular jury and the number of Negroes in the community.

"What is true in the case of juries is also true in the area of employment. H.R. 7152 does not require that every employer with more than 25 employees hire a Negro or a certain percentage of Negroes. It is possible that although a particular jury or a particular business will contain no Negroes, no charge of discrimination will be made. But businesses, like juries, may not systematically exclude Negroes, when the only ground for exclusion is the color of a man's skin.

"So I think the experience with juries is on all fours with what will be the situation in the case of employment. In practice, I know this is true in New Jersey, which I am so proud to represent. No quotas are applied there.

"There is an absolute absence of discrimination for anyone; and there is an absolute prohibition against discrimination against anyone."[90]

On April 25, Senator Keating took the floor during the "morning hour" to respond to a public advertisement charging that the bill would require quotas:

"The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .

"Title VII does not grant this authority to the Federal Government. To make such assertions, as the coordinating committee does, is not only an unfortunate misinterpretation of the title's operation but is a cruel hoax because it generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence. . . .

"An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrim-

[90] *Id.* at 8921.

> ination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution."[91]

On May 4, Senator Allott proposed an amendment which would preclude courts from finding a violation "solely on the basis of evidence that an imbalance exists with respect to . . . race, color, religion, sex, or national origin . . ."[92] Senator Allott explained the purpose of his amendment:

> "Mr. President, I have heard over and over again in the last few weeks the charge that title VII, the equal employment opportunity section, would impose a quota system on employers and labor unions. There are two variations of the argument. One is that because title IV specifically says that 'desegregation' shall not mean assignment of students to public schools in order to overcome racial imbalance, and title VII contains no such disclaimer in relation to employment practices, then it follows that title VII is intended to require hiring to overcome racial imbalance in the workforce. The other variation is that an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the Equal Employment Opportunity Commission. The result, either way, so the argument goes, is that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group.
>
> "I do not agree with the argument. The junior Senator from Florida [Mr. SMATHERS] and I discussed this for the record one evening here on the Senate floor, and I believe I made it clear at that time that I do not believe Title VII would result in imposition of a quota system. Further, I believe that a quota

[91] *Id.* at 9113.

[92] *Id.* at 9881-82.

> system of hiring would be a terrible mistake, not only from the viewpoint of the employer, but from the viewpoint of the employee—from the viewpoint of the minority as well as the majority. Basically, I believe that the color of a man's skin, or the faith to which he adheres, should be completely extraneous considerations when an employer hires or a labor union admits to membership—just as it should be extraneous in granting the right to vote or in assigning him to a school.
>
> "But the argument has been made, and I know that employers are also concerned with the argument. I have, therefore, prepared an amendment which I believe makes it clear that no quota system will be imposed if title VII becomes law. Very briefly, it provides that no finding of unlawful employment practice may be made solely on the basis of racial imbalance."[93]

On May 8, Senator Carlson introduced an explanatory statement about the bill, which provided, in pertinent part:

> "Should voluntary efforts fail, the Commission could bring suit in the Federal courts and would have the burden of proving discrimination. Individual suits could be brought only if the Commission failed to sue and, even then, only if one member of the Commission gave his written consent. There would be no authority to *require* quota hiring to achieve racial balance or to order firing of whites to create jobs for Negroes. Union seniority would not be affected and employers would remain wholly free to hire or fire on the basis of job qualifications."[94]

On May 20, Senator Javits took the floor to respond to charges contained in a campaign speech by Governor George Wallace. Governor Wallace had said:

> "An employer can lose his right to hire whomever he might choose—the power being vested in a federal inspector who, under an allegation of racial imbalance

[93] *Id.* at 9881.

[94] *Id.* at 10520 (emphasis added). Senator Carlson was one of the Republican supporters.

or religious imbalance, can establish a quota system whereby a certain percentage of a certain ethnic group must be employed as supervisors, skilled, and common labor."[95]

Said Senator Javits:

> "The fact is that the Bill is enforceable only in the courts and in no respect *imposes* a quota system or racial imbalance standard.
>
> "Another thing that people were put in fear about was seniority and trade unions. Governor Wallace said that union seniority systems would be abrogated and that white men's jobs would be taken and turned over to Negroes. That is untrue. The only thing that the bill will do—and the administration of existing state laws has confirmed it—is deal with outright cases of discrimination."[96]

That same day (May 20), Senator Humphrey introduced a newsletter "stating some of my observations on the Civil Rights bill, as to what it provides and what it does not provide."[97] In part, the newsletter stated:

> "The bill does not permit the federal government to *require* an employer or union to hire or accept for membership a quota of employees from any particular minority group."[98]

On May 22, Senator McGovern declared:

> "The bill does not *create* any hiring quotas."[99]

On May 25, Senator Humphrey introduced a brief explanation of the House bill prepared by his staff, which he said had been "read and approved by the bipartisan floor

[95] *Id.* at 11471.

[96] *Id.* at 11471 (emphasis added). Senator Javits was a Republican supporter.

[97] *Id.* at 11486.

[98] *Id.* at 11486 (emphasis added).

[99] *Id.* at 11768.

managers of the bill in both houses of Congress."[100] In pertinent part, the explanation provided:

> "The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .
>
> "The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the Title would prohibit preferential treatment to any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. The Title contains no provisions which would jeopardize union seniority systems, nor would anything in the Title permit the government to control the internal affairs of employers or labor unions. Employers would continue to be free to establish their own job qualifications provided they do not discriminate because of race, color, religion, sex, or national origin. . . ."[101]

c. The Dirksen-Mansfield Substitute.

On May 26, 1964, Senator Dirksen introduced the comprehensive "Dirksen-Mansfield" substitute for the House-passed bill, which left unchanged the basic prohibitory language of Title VII (§§ 703(a)-(d)), as well as the remedial provision (§ 706(g)), but which added several provisions (including § 703(j)) limiting or defining the scope of the substantive prohibitions.[102] Senator Dirksen explained that the substitute "represents not merely weeks but months of labor:"

[100] *Id.* at 11847.

[101] *Id.* at 11847.

[102] *Id.* at 11926-35.

> "When I first looked at the House Bill, I saw in it some inequities and imperfections and technical errors which did not satisfy me." [103]

The substitute was initially drafted and considered at four or five Republican Party conferences,[104] following which

> "at least five conferences were held, consecutively, in my office, attended by Senators who represent all shades of opinion with respect to this measure. Included also were the Attorney General, the Deputy Attorney General, and the Director of the Division of Civil Rights in the Department of Justice.
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> • • •
>
> "As a result of the various conferences, and by the process of give and take, we have at long last fashioned what we think is a workable measure." [105]

Senator Dirksen opined:

> "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." [106]

Senator Kuchel explained that the substitute was designed, *inter alia*, to recognize the respective "responsibilities" of the Federal Government, the States, and, in "this free land of ours," "the American citizen." [107]

On June 1, Senators Mansfield, Dirksen, Miller, and Cooper engaged in a colloquy about the importance of establishing a legislative record explaining the meaning of the amendments accomplished by the substitute. As Senator Miller observed, while many Senators had received explana-

[103] *Id.* at 11935.

[104] *Id.* at 11935, 11936.

[105] *Id.* at 11935. The substitute was also cleared with the House leadership before being introduced in the Senate. *Id.* at 12594 (Senator Clark); *Vass, supra*, at 445.

[106] *Id.* at 11935.

[107] *Id.* at 11937.

tions in the respective Democratic and Republican caucuses, "that is not the point," as the courts would not have access to those caucuses in ascertaining the bill's meaning. What was needed were explanations on the record, "so that in future litigation—which is bound to occur—on this bill, a court will know what the intention of Congress was." [108] Senator Dirksen announced that he was preparing a title-by-title explanation of the amendments.[109] Senator Cooper noted that as Senator Dirksen was "the author in chief of most of the amendments," an explanation from him of their purpose "would provide a legislative interpretation." [110]

On June 3, Senator Clark made a lengthy speech about the changes in Title VII, which he characterized as "perhaps more extensive" than any in the rest of the bill. He said that "the credit or the blame—whichever it may be" should go to Senator Dirksen, who was principally responsible for them. "[T]he imprint of the thinking of the Senator from Illinois [Mr. DIRKSEN], is on the substitute." Clark's "candid political judgment" was that "if we want any bill at all enacted, we must take the Dirksen amendment," for otherwise there were not enough votes to obtain cloture; but this was a conclusion "reached . . . reluctantly." [111]

Senator Muskie characterized §§ 703(g) through (j) as "limit[ing] the term 'unlawful employment practice' by spelling out a number of situations that could not be considered unlawful." [112]

On June 4, Senator Humphrey made one of the two major presentations explaining the purpose of the Dirksen-Mans-

[108] *Id.* at 12275.

[109] *Id.* at 12275.

[110] *Id.* at 12276.

[111] *Id.* at 12593.

[112] *Id.* at 12618.

field substitute amendments. (The other was Senator Dirksen's written explanation the following day.) Senator Humphrey's full statement respecting § 703(j) was as follows:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of the bill have carefully stated on numerous occasions that title VII does not *require* an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have mentioned all along about the bill's intent and meaning."[113]

Senator Dirksen's "explanation of the changes made in the substitute amendment"[114] provided, as to § 703(j):

> "New subsection (j) provides that this title does not *require* preferential treatment be given any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed, in comparison with the total number or percentage of such persons in that or any other area."[115]

On June 9, the Senate took up Senator Ervin's amendment, which proposed to delete Title VII from the bill.[116] Speaking in support of the amendment, Senator Sparkman predicted that Title VII would lead to imposed quotas despite "the so-called mitigating language" in the substitute (*i.e.* § 703(j)).[117] Senator Clark spoke in opposition:

> "This bill does not make anyone higher than anyone

[113] *Id.* at 12723 (emphasis added).

[114] *Id.* at 12817.

[115] *Id.* at 12819 (emphasis added).

[116] *Id.* at 13073.

[117] *Id.* at 13074.

> else. It *establishes* no quotas. It leaves an employer free to select whomever he wishes to employ. It enables the labor union to admit anyone it wishes to take in. It tells an employment agency that it can get a job for anyone for whom it wishes to get a job.
>
> "All this is subject to one qualification, and that qualification is to state: 'In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin or sex."[118]

The Ervin amendment was defeated,[119] and the Senate then took up Senator Cotton's amendment to limit Title VII to employers of 100 or more employees.[120] In the course of the debate on this amendment occurred the only discussion in the entire Senate debates of the possibility that employers might wish to reserve jobs for minorities in order to assist them in overcoming their employment disadvantage. Senator Curtis raised this possibility, but he did so not in the context of an employer who might wish to eliminate racial imbalance, but rather with the example of an employer who "might wish to employ *almost entirely, or entirely,* members of a minority race in order to enhance their opportunity."[121] Senators Curtis and Cotton were in agreement that the bill as written would forbid this, a prohibition both thought regrettable.[122] Senators Curtis and Cotton both were opponents of Title VII.[123]

[118] *Id.* at 13079-80 (emphasis added).

[119] *Id.* at 13085.

[120] Id. at 13085. The bill proposed to cover employers of 100 or more immediately, but to apply in successive years to employers of 75, 50, and eventually 25. *Ibid.*

[121] *Id.* at 13086 (emphasis added).

[122] *Id.* at 13086. Senator Cotton observed, however, that it was unlikely that the Act would be administered so quixotically as to condemn an employer for attempting this. *Id.* at 13087.

[123] Both had just voted in favor of the Ervin Amendment to de-

Senator Humphrey spoke against the Cotton amendment, and in the course of a lengthy demonstration that Senator Cotton's concerns that small employers would be oppressed by Federal enforcement were unwarranted, included this statement:

> "Nothing in the bill or in the amendments *requires* racial quotas. The bill does not provide that people shall be hired on the basis of being Polish, or Scandinavian, or German, or Negro, or members of a particular religious faith. It provides that employers shall seek and recruit employees on the basis of their talents, their merits, and their qualifications for the job." [124]

The Cotton amendment was defeated.[125]

Cloture was finally voted on June 10, 1964.[126] On June 18 and 19, in anticipation of the final vote, many sponsors spoke in support of the bill's passage, and two referred to the subject of quotas.

Senator Miller bracketed the three distinct issues of "racial balance" which had been discussed during the debates—the three which the Republican sponsors in the House had made clear were neither required nor forbidden by the Act (*supra*, pp. 34-35)—and articulated the same view:

> "I think it well to point out that this bill makes it very clear that such controversial and community oriented problems as the busing of schoolchildren from one district to another and the sale or renting of privately owned housing according to the preference of the owner are left to the State and local governments for resolution. Also, under the equal employment opportunities provisions in title VII, the bill makes it very clear that . . . Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance is not authorized." [127]

Senator Williams of Delaware introduced a letter he had received from Senator Dirksen answering certain questions he (Senator Williams) had asked about the bill. "Since [Senator Dirksen] was the author of several of the amendments approved by the Senate I felt it was important that his interpretation of their legislative intent be incorporated in the RECORD." [128] In pertinent part, the letter from Senator Dirksen, dated June 18, 1964 (the day preceding the Senate's final vote) read as follows:

> "DEAR JOHN: I have your letter of June 17 raising questions which have been brought to your attention . . . Let me set out your questions and then follow them with my views so that you will have a complete record in this letter.
>
> • • •
>
> "5. That an employer would be required to maintain a racial ratio in his employment roughly equivalent to the racial ratio existing in this community.
>
> "The Senate substitute bill expressly provides that an employer *does not have to* maintain any employment ratio, regardless of the racial ratio in the community.
>
> • • •
>
> "Sincerely,
>
> "Everett McKinley Dirksen". [129]

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lete Title VII, *id.* at 13085; Senator Cotton ultimately voted against the entire Civil Rights Act because of its inclusion of Title VII, *id.* at 14511 (see also *id.* at 14190), and Senator Curtis voted for the Act only after expressing grave misgivings because of its inclusion of Title VII, *id.* at 14484.

[124] *Id.* at 13088 (emphasis added).

[125] *Id.* at 13093.

[126] *Id.* at 13327.

[127] *Id.* at 14313-14.

[128] *Id.* at 14329.

[129] *Id.* at 14329 (emphasis added). Senator Williams then provided his own comparison of the House and Senate bills (*id.* at 14331), including:

On June 19, 1964, the longest debate in the history of the Senate—83 days—came to an end: the Civil Rights Act was passed.[130]

5. House Consideration of the Senate Amendments

As the Senate had substantially amended the bill passed by the House, it was necessary for the House to consider whether it would concur in the Senate's amendments. The House Judiciary Committee brought the bill to the floor of the House (without an explanatory report) with a recommendation that the House concur in the Senate's bill.[131]

Three Republican members of the Judiciary Committee—all of whom had been signers of both the "Additional Views" in the Committee Report, *supra*, pp. 30-31, and of the memorandum quoted, *supra*, pp. 34-35—were the only Congressmen to refer to quotas during the House's debate on the Senate amendments. Representative Lindsay stated:

> "[W]e wish to emphasize that this bill does not *require* quotas, racial balance, or any of the other things that the opponents have been saying about it."[132]

Representative McCulloch, undertaking "to negate only a few of the most glaring inaccuracies that have had such wide dissemination," declared, *inter alia:*

"Third. The bill does not permit the Federal Government to interfere with the day-to-day operations of a business or labor organization.

"Fourth. The bill does not permit the Federal Government to *require* an employer or union to hire or accept for membership a quota of persons from a particular minority group.

"Fifth. The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees."[133]

And, Representative MacGregor announced what we submit is the correct synthesis of all the legislative history:

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically.

"Title IV, as amended by the Senate, provides:

[Quoting § 407]

"The Senate laid to rest the fear that the Federal Government would begin to use GI and FHA mortgages to control home sales or rentals with the following amendment:

[Quoting § 601]

"Finally, Mr. Speaker, in the difficult area of equal employment opportunities, the Senate has added this language to title VII:

"Senate amendments specifically prohibit the Attorney General, or any agency of the Government, from *requiring* employment to be on the basis of racial or religious quotas.

"Under the Senate amendments, an employer *could* continue to hire only the best qualified persons even if they were all white and his factory was in an area with 50 percent Negroes." (emphasis added)

[130] *Id.* at 14299-14300, 14511.

[131] *Id.* at 15897.

[132] *Id.* at 15876 (emphasis added).

[133] *Id.* at 15893 (emphasis added).

[Quoting § 703(j)]

"Mr. Speaker, the Senate has improved this bill in clarifying its scope and coverage." [134]

A few minutes later, the House voted to concur in the Senate's amendments, thus enacting the Civil Rights Act of 1964,[135] and the President signed the Act later that same day.

6. The Interplay Between Title IV and Title VII

The link Representative MacGregor noted between the issues of "racial 'balancing' in the public schools" and "preferential treatment or quotas in employment" in the last passage quoted reflects a significant theme in the Congressional debates. The analogy Congress saw between the two issues confirms the conclusion that Title VII was not meant to prohibit the private adoption of racial quotas to eliminate racial imbalance.

Private quota programs to eliminate *de facto* segregation in employment were not yet a significant phenomenon by 1964. However, the New York and Chicago school systems were embarking upon voluntary programs to racially balance their *de facto* segregated school systems. The impact which the Civil Rights Act would have upon these programs was discussed at length, and a clear legislative decision was reached: the Act would neither require nor forbid racial balancing in *de facto* segregated school systems; that matter would be left to the free choice of local school authorities. Having made that decision in Title IV, Congress also applied it by analogy in Title VII.

a. The Decision Under Title IV

Title IV of the Civil Rights Act, as reported out by the House Judiciary Committee, authorized the Commissioner of Education to provide technical assistance and financial aid to assist school boards in desegregating *de jure* segregated school systems, and empowered the Attorney General to bring suits to compel desegregation of such school systems. In his opening speech in support of the bill on the floor of the House, Judiciary Committee Chairman Celler declared:

"There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in [*de facto* segregated] schools. *Such matters, like appointment of teachers and all other internal and administrative matters, are entirely in the hands of the local boards. This bill does not change that situation.*" [136]

Representative Celler explained that this was an answer to the charge that "the bill would deprive public and private schools of the right to manage their own internal affairs. This is clearly not the case . . . Local authorities would remain in complete control of their school systems." [137]

This same view was repeatedly expressed in the Senate. As Senator Keating put it:

"That question is left entirely to the board of education of the city of New York and similar boards in every other community in the Nation. The bill expressly removes that question from any Federal control or Federal jurisdiction.

• • •

"[T]hat is a matter which should be dealt with by the board of education in the municipality involved and by the State concerned. The wording of the bill in that respect is exactly what it should be. The Federal Government should keep its hands off that matter." [138]

Senator Douglas:

"It would be possible for States and localities to follow such policies as they thought wise and proper, but it would not be a requirement of Federal law. This

[134] *Id.* at 15893.

[135] *Id.* at 15897.

[136] 110 Cong. Rec. 1518 (emphasis added).

[137] *Id.* at 1518.

[138] *Id.* at 5266.

is one of the issues with which we are trying to deal in Chicago.

• • •

"Not only is the racial imbalance question not dealt with in this bill, but the bill expressly and specifically excludes the problem of racial imbalance from the scope of the bill."[139]

Senator Cooper:

"In my judgment, [the subject of racial balance in schools] ought to be decided at the local level, by the local school board. In my opinion, jurisdiction over these problems will be there."[140]

See also 110 Cong.Rec. 7788 (Sen. Scott) (State and municipal law in this area "is not touched by Federal legislation"); 7098-7100, 8057, 8064 (Sen. Javits); 11761-62 (Sen. Douglas).

b. The Link to Title VII

Although Congress had no concrete examples of private quota programs to eliminate racial imbalance in employment, it saw the analogy between such programs and voluntary efforts to end *de facto* school segregation. The Title IV decision was predicated upon Congress' desire not to intrude unnecessarily into school board decision-making. A similar desire—not to intrude unnecessarily into managerial and collectively-bargained decision-making—was at the forefront of its consciousness in shaping Title VII. And thus it is not surprising that the Congressional decision to permit, but not to require, racial balancing in employment was repeatedly linked to the similar decision under Title IV.

The explanation, quoted in part earlier, of the Republican sponsors on the Judiciary Committee of Title VII as passed by the House put the point this way:

"The Civil Rights Bill, as passed by the House, does

[139] *Id.* at 6820.

[140] *Id.* at 6841.

not in any way *require, reward,* or *encourage:* (1) 'open occupancy' in private housing, (2) the transfer of students away from the neighborhood schools to create 'racial balance,' or (3) the imposition of racial quotas or preferences in either private or public employment of individuals.

• • •

"Title IV of the Civil Rights Bill provides that the Attorney General may institute a civil action to desegregate public schools or colleges . . . In creating this authority, however, the House specifically precluded the Attorney General . . . from taking action under this Title to *compel* the racial balancing of schools.

• • •

"[Under Title VII, upon] conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, Title VII does not permit the *ordering* of racial quotas in businesses or unions. . . ."[141]

In the Senate, a number of Senators noted the analogy between Titles IV and VII. Senator Kuchel introduced the House Republican sponsors' explanation (just quoted) at the close of his principal speech in support of the bill.[142] Senator Scott declared that Title VII, like Title IV, was not designed to integrate, but only to forbid discrimination.[143] Senator Allott urged addition of a provision such as § 703(j) because arguments were being made that the existence of a "racial balance" proviso in Title IV but not in Title VII implied "that Title VII is intended to require hiring to overcome racial imbalance in the workforce."[144] Senator Bayh declared:

"The Civil Rights bill does not permit the federal

[141] *Id.* at 6565-66 (emphasis added). See also *id.* at 1994 (Rep. Healey).

[142] *Id.* at 6565-66.

[143] *Id.* at 7789.

[144] *Id.* at 9881.

> government to transfer students among schools to create a racial balance in classrooms or schools. . . . The Civil Rights bill does not permit the federal government to interfere with the day-to-day operations of a business or a labor union; nor does the Bill require unions or employers to establish or maintain a quota from any particular minority group. . . ." [145]

Senator Miller added:

> "I think it well to point out that this bill makes it very clear that such controversial and community oriented problems as the busing of schoolchildren from one district to another and the sale or renting of privately owned housing according to the preference of the owner are left to the State and local governments for resolution. Also, under the equal employment opportunities provision in Title VII, the bill makes it very clear that . . . Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance is not authorized." [146]

And, of course, when the bill returned from the Senate to the House, Representative MacGregor, speaking a few minutes before the vote which enacted the bill, emphasized the congruence in this regard between Title IV and Title VII as amended by the Senate, p. 65, *supra*.

C. The Meaning of the 1964 Legislative History

First, the focus of the debate in Congress was not on whether employers and unions would be left *free* to adopt quotas, but whether under Title VII the Federal Government could *require* quotas. To this latter question, Congress' answer was unequivocal:

(a) Quotas are not a remedy which courts may impose for proven discrimination under Title VII: Chairman Celler, one of the bill's managers in the House, the key Republican sponsors in the House, and Senators Humphrey and Kuchel, the co-managers in the Senate, made definitive statements to this effect,[147] which were seconded by others,[148] and never contradicated by any supporter of the bill. As Senator Humphrey explained,[149] the last sentence of § 706 (g)—authorizing hiring and promotion remedies only for the victims of discrimination—is the statutory provision which embodies the sponsors' intent in this respect.[150]

(b) An employer's or union's failure to adopt quotas to eliminate a racial imbalance is not itself "discrimination." The sponsors consistently contended that the bill as originally drafted made this clear,[151] but in the face of continuing charges to the contrary Senator Dirksen's compromise bill—the means of securing the Republican votes necessary to break the filibuster—expressly so provided in § 703(j).

Second, the answer to the question whether employers and unions would be *free* to adopt quotas to eliminate a racial imbalance is not quite as certain, because a few liberal Senators who were principal sponsors of the bill made statements, prior to the adoption of § 703(j), signifying their belief that such quotas would constitute "discrimi-

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[145] *Id.* at 10069.

[146] *Id.* at 14313-14.

[147] *Supra,* pp. 31-32, 34-35, 38-39, 40-41.

[148] *Supra,* pp. 46-47, 51-53, 53-54.

[149] *Supra,* pp. 38-39.

[150] In practice, Sen. Robertson's prediction to Sen. Humphrey—that no matter how clearly the statute might forbid quota remedies, the courts would impose them anyway (p. 46, *supra*)—has proved prescient. The Courts of Appeals that have faced the question have uniformly concluded, without citing the legislative history described above, that quotas are an available remedy under Title VII; they have differed only on the question of how broadly or narrowly that remedial power should be used. See, e.g., *United States* v. *Elevator Contractors Local 5,* 538 F.2d 1012 (3rd Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2nd Cir. 1976); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 484 (1971).

[151] See pp. 32, 34, 45, 48-49, *supra.*

nation." Nevertheless, the decisive weight of the evidence is that, as § 703(j) on its face suggests, Congress did *not* intend to make it unlawful for employers and unions to adopt quotas to eliminate a racial imbalance. The following considerations all support that ultimate conclusion:

(a) Title VII was predicated solely on the Commerce Clause, and (in 1964) was addressed solely to the private sector. Congress understood, therefore, that it was writing on a clean slate.[152] At the time the bill was being considered, under federal law employers and unions were free to select and assign employees to segregate *or* integrate their workforces; the Constitution, of course, is inapplicable to such private decision-making. It was for Congress to decide the extent of the intrusion which Title VII would make upon this existing entrepreneurial freedom.

(b) The dynamic in both Houses was that the bill would not pass without the support of legislators who were traditional "conservatives" in the sense that they opposed expansive governmental intrusion into the free enterprise system and free collective bargaining.[153] These legislators, from the start, saw Title VII as containing the potential for far-reaching government dictation of day-to-day managerial and collective bargaining decisions. From the start, therefore, they announced that their support was conditioned upon acceptance of the principle that the bill would intrude upon private decision-making only to the extent necessary to address the evils at which the bill was aimed. As the Republican sponsors in the House declared, in their "Additional Views" accompanying the House Report reporting out the bill:

> "[M]anagement prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor unions must not be interfered with except to the limit extent that correction is required in discriminatory practices."[154]

[152] *Supra*, pp. 16-18.

[153] *Supra*, pp. 18-19.

This philosophy was repeatedly expressed by conservatives, and liberals invariably acknowledged that this was a basic principle underlying the bill.[155]

(c) In the original House debate on Title VII, there is absolutely *no* indication that anyone thought Title VII would invalidate private decisions to eliminate racial imbalance in employment; and at the end of that debate, the Republican sponsors announced that under Title VII governmental imposition of quotas was forbidden, but private adoption was permissible (albeit not "rewarded" or "encouraged").[156]

(d) The Senate debate divides into two parts: before § 703(j), and after. In the first period, a few liberal Senators expressed their view that Title VII reached all race-conscious selection decisions. None of these addressed a race-conscious program to integrate such as is here involved. Rather, in each instance, it was an expansion of an argument to show that Title VII does not *require* quotas.[157] But their views do not express the will of Congress. For the conservative Republicans whose votes were critical to ending the filibuster redrafted the bill, added § 703(j), and in the words of Senator Dirksen, created a statute under which employers "do not have to" engage in racial balancing.[158] From the date of § 703(j)'s introduc-

[154] *Supra*, p. 31.

[155] *Supra*, p. 19, note 19.

[156] *Supra*, p. 34-35.

[157] Given the strong recognition by these Senators that Title VII would not succeed in elevating minorities from their economic disadvantage absent concomitant training ("they are as interdependent as the chicken and the egg"), see pp. 83-84, *infra*, it is questionable whether even *they* would have disapproved expanding the opportunities of minorities for training through programs such as that here.

[158] *Supra*, p. 63.

tion forward, not even the liberals suggested that Title VII *forbade* private decisions to eliminate racial imbalance.

(e) When the Senate bill returned to the House, its application to quotas was discussed only by the Republican sponsors, and they expressly stated that the bill neither required nor forbade racial balancing, but instead left the matter to private decision-making.[159]

(f) Congress focused specifically on racial balancing in Title IV of the bill, and made a considered determination that the choice whether to engage in racial balancing to end *de facto* discrimination should be left to local decision-making. This choice was predicated upon an expressed deference to school board autonomy, quite similar to the deference expressed for "managerial prerogatives, and union freedom," and Congress recognized the analogy between its decision in the two titles.[160]

D. The 1972 Legislative History

The only post-1964 legislative consideration of Title VII claimed by any party to be relevant here is that which occurred in 1972, culminating in the Equal Employment Opportunity Act of 1972, P.L. 92-261. For present purposes it is dispositive that the 1972 EEO Act did not change a word in § 703, and that no new language was added elsewhere in the Act relating in any way to quotas.[161] Moreover, even if one were willing to draw inferences as to the meaning of a statute from votes rejecting proposed amendments to that statute eight years later, there were no votes which could conceivably reflect the view of the 1972 Congress as to the 1964 Act's application to quotas.

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[159] *Supra.* pp. 64-65.

[160] *Supra,* pp. 66-70.

[161] A minor change was made in § 706(g), but as we show *infra,* p. 79, it merely reinforced the courts' power to grant victims of discrimination "rightful place" relief.

Indeed, there were no votes at all in the House on any proposed amendments dealing with quotas.[162]

In the Senate, Senator Ervin introduced two amendments to expressly prohibit government compulsion of quotas under either Title VII or Executive Order 11246. He argued that the 1964 Act already forbade any such compelled quotas, but that government officials were ignoring that prohibition and thus a more explicit direction was needed.[163] Senators Javits and Williams opposed these amendments, arguing, *inter alia,* that what government officials were imposing were "goals" and "timetables," not "quotas"; that the Ervin Amendments as worded would render Title VII entirely unenforceable, precluding even "rightful place" relief; and that current developments in the implementation of Title VII and the Executive Order should be allowed to continue.[164] The Ervin Amendments were defeated.[165] The Senate thus determined to leave § 703 as enacted in 1964.

An expression of views by one house of the 92nd Con-

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[162] The House Committee on Education and Labor reported out a bill which, *inter alia,* would have given the EEOC the authority to issue cease and desist orders, and would have transferred to the EEOC the authority to enforce Executive Order 11246. Rep. Dent, who was the bill's floor manager, proposed an amendment to the bill to prohibit the EEOC "from imposing or requiring a quota or preferential treatment." There was an inconclusive discussion of the amendment, with some speakers indicating that the prohibition already existing in Title VII would by its terms become applicable to the EEOC should the EEOC acquire decision-making power. The amendment never came to a vote, however, because meanwhile the Committee bill was replaced by a substitute (the Erlenborn substitute) which did not vest the EEOC with any decision-making powers. Rep. Dent's amendment thus was moot. For the consideration of the Dent amendment, see 117 Cong. Rec. 31784, 31965-66, 31975, 32089-90, 32091.

[163] 118 Cong. Rec. 1662-64, 4917-18.

[164] 118 Cong. Rec. 1664-65, 4918.

[165] 118 Cong. Rec. 1676, 4918-19.

gress (assuming the defeat of the Ervin Amndments can be determined to have expressed a particular view) cannot alter the meaning of a statute positively enacted by both houses of the 88th Congress.

II. ALTERNATIVE THEORIES PREMISED UPON ASSUMED GOVERNMENTAL POWERS ARE NOT APPROPRIATE BASES FOR DECIDING THIS CASE.

In part I, we established that Title VII does not prohibit private parties from adopting quota programs of the type at issue here. On that basis the decision of the court below should be reversed. We believe that no other issue is presented.

In this part of the brief, we state our position with respect to two alternative theories which the government, and others, have sought to insert into this case: First, that even if programs of the type here are generally forbidden by Title VII, there is nevertheless a zone in which private parties are permitted to adopt such programs, a zone which is derived from the presumed power of courts to order quotas as remedies in Title VII cases—*i.e.* the power of courts to direct that a defendant employer or union, found to have violated Title VII, establish a program of racial preferences to benefit persons who were not *victims* of the Title VII violation. Second, that even if private voluntary programs such as that here are violative of Title VII, employers and unions may nevertheless be authorized to undertake such programs by the Office of Federal Contract Compliance (OFCC).

We submit that the decision of this case cannot depend upon either of these theories. We deal with each in turn.

A. Obviously, if we are correct in our position stated in part I, the question whether some zone in which private quota programs, otherwise violative of Title VII, are permissible, may somehow be derived from an assumed power of courts to order quota relief in Title VII cases, never arises. For, if Title VII does not prohibit private quota

programs to eliminate a racial imbalance there is no reason to consider the convoluted route offered by this theory just to reach the same end.

If our position stated in part I is wrong, it would still be inappropriate to consider this alternative theory here because the factual predicate for the theory is not presented on the record of this case. The major premises for the theory are as follows: courts may, upon finding discrimination in violation of Title VII, order quota "remedies"; Title VII favors voluntary compliance; therefore, private parties ought to be able—*in those instances where they can establish that there might be some predicate for a court to act*—to avoid litigation by voluntarily putting into place the kinds of remedies courts would order. The limitation that the parties can establish the existence of some predicate for a court-ordered quota is critical to this alternative theory; otherwise, the results of the theory would outrun its rationale. But, the record of this case establishes neither that the parties considered whether there was a reasonable basis for a court-ordered quota in this case, nor that such a basis in fact existed.

As the record shows, the quota program for filling craft apprenticeship vacancies at the Gramercy plant was established as part of a nationwide agreement between Kaiser and USWA covering 15 Kaiser plants throughout the United States. Kaiser and USWA entered into that program without making a plant-by-plant assessment of whether a plaintiff might be able to prove a *prima facie* case of discrimination against blacks in entry into craft jobs, and without such an assessment at the Gramercy plant in particular. The Kaiser officials who negotiated the program did not believe Kaiser had engaged in such discrimination. And, the courts below found as fact that Kaiser had not discriminated against blacks in filling craft jobs at the Gramercy plant. USWA Pet. App. A at 5a-6a; USWA Pet. App. B at 31a-32a.

Therefore, the validity of the alternative theory—that a

right of private parties to establish quota programs may be derived from the courts' power to order such programs as a "remedy" for discrimination—is not presented on this record.

However, because we are troubled by the practical implications of this theory,[166] and because others press it upon the Court in this case, we discuss briefly several apparent flaws in this theory.

The major flaw in the theory is that, as we showed in part I, Congress expressly rejected its first premise. Floor leaders and principal supporters of Title VII in both Houses assured their fellow members in unambiguous terms that under no circumstances would Title VII empower courts to direct defendants to adopt racial quotas, even in cases where discrimination in violation of the Act is proven. See, *e.g.*, *supra,* at 31-32, 34, 38-39, 40-41, 46-47, 51-53, 53-54.

Those assurances were firmly grounded in the language of both the prohibitory and remedial sections of the bill as enacted. What Title VII forbids is discrimination "against any individual." § 703(a)-(d). The hiring, reinstatement, and promotion remedy it provides, set forth in § 706(g), is solely for "individuals" who have been victims of such violations. Section 706(g) specifically states that "[n]o

[166] While it is clear, as discussed above, that the theory requires that the parties establish that there would have been some reasonable basis for a court to have directed a quota program, it is not so clear what kind of showing would suffice. It is only in the context of this theory, for example, that the following questions raised by the Government and by Kaiser in their respective petitions become relevant: Must the parties to a quota program admit they engaged in prior discrimination? Must they establish that a *prima facie* case of discrimination could have been proven against them? That such questions need to be asked may reveal the inherent deficiency of the theory itself. But, in any event, whatever the standard might be, it would limit the ability of private parties to adopt such programs, and might jeopardize existing programs that USWA has negotiated throughout the steel, aluminum and can industries.

order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee" if such individual was not a victim of a Title VII violation.

In 1972, Congress amended § 706(g) in several respects. The language just quoted and the philosophy of the provision as enacted in 1964 were, however, left intact. The definitive explanation of the 1972 amendments to § 706(g) is contained in the Section-By-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act....
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

See, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976).

Thus, the remedial concept of the 1964 Act was confirmed by the 1972 Congress: victims of proscribed conduct under

Title VII are to be "restored to a position where they would have been were it not for the unlawful discrimination"; for non-victims, courts may not order, in the words of § 706(g), "the hiring, reinstatement, or promotion of an individual as an employee."

The limitation of these remedies under Title VII to so-called "rightful place" relief is true to the construction given to the model used by Congress in drafting § 706(g): § 10(c) of the National Labor Relations Act. See *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 769, 774-775, and n. 34; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 419 (1975). Quota "remedies" have never been awarded under § 10(c).[167]

The assumption that once a court in a Title VII case finds discrimination of some sort, it may then award a hiring, reinstatement or promotion remedy directed not at making-whole a victim of that discrimination but at providing a benefit to a non-victim—because that non-victim is the same race as the actual victim—is at odds with the remedial scheme of Title VII as just described.[168] This Court has

[167] When an employer is found to have discriminated against union members in hiring to avoid unionization, in violaton of 8(a)(3) of the National Labor Relations Act, the remedy awarded under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority; the Board has never directed an employer to give preferential treatment in future hiring to union members who were not victims of the violation. See *Franks, supra* at 774-775, n. 34; see, *e.g., Nevada Consolidated Copper Corp.,* 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942); *Consolidated Dairy Products,* 194 NLRB 701 (1971); *Great Lakes Bridge & Dry Dock Co.,* 169 NLRB 631, 635 (1968); *The Hughes Corp.,* 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.,* 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

[168] Likewise in school desegregation cases, this Court has stated the remedial principle as follows: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible

never held that Title VII grants courts authority to award preferential treatment to non-victims. Indeed, this Court has twice been careful to limit the remedy for a Title VII violation to the restoration of the individual victims of the violation to their "rightful place." *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-773, and n. 32; *Teamsters* v. *United States,* 431 U.S. 342, 362-376 (1977).[169] All of the opinions in *Franks* suggested that where injunctive remedies will subordinate the job rights of competing innocent employees, the equitable principles which control

'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct'." *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students affected by such practices are by definition victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of educational deficiencies which resulted from those practices. *Milliken* v. *Bradley,* 433 U.S., *supra* at 282-283; *Swann* v. *Board of Education,* 402 U.S., 1, 28, 31-32. In that context, make-whole relief may require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann, supra,* at 15-16, 31-32; *Pasadena City Bd. of Education* v. *Spangler,* 427 U.S. 424, 435-437 (1976); *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 419-420 (1977).

[169] Under *Frank* and *Teamsters,* when a class violation is proven, the burden of proof shifts to the defendant to establish that individual members of the class against whom the violation was committed were not actually victims of the violation. This shift in the burden of proof is not equivalent to providing preferential treatment to non-victims. The issue remains, who were victims of the unlawful practice? Members of the class against whom the practice was committed—*e.g.* black applicants for jobs from an employer who was proven to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise.

the fashioning of relief under Title VII require that such remedies be tailored to righting the wrong that was done and no more.

Further, the only conceivable occasion for the Court to address the alternative theory now under discussion would be if the Court rejects the position stated in part I of this brief. But, if we are wrong in our position stated there, then quota programs of the type at issue here are themselves violative of Title VII: they are the kind of "discrimination" Congress meant to outlaw. On this assumption, to uphold the alternative theory, this Court would have to find that Congress authorized courts, upon the occasion of a Title VII violation, not only to make the victims of the violation whole, but also to direct the very type of racial quota program that Congress in the same statute prohibited as unlawful discrimination. The Court in construing the model for Title VII's remedial provisions—§ 10(c) of the NLRA—has refused to attribute to Congress the intent to achieve such an anomalous result. See *Porter Co.* v. *NLRB*, 397 U.S. 99, 107-108 (1970).

B. If we are correct in our position stated in part I, there is no reason, either, to consider the second alternative theory—that the OFCC, pursuant to Executive Order 11246, may authorize private parties to adopt quota programs otherwise violative of Title VII. If, as we showed in part I, Title VII does not prohibit the kind of program here at issue, authorization from OFCC would be unnecessary.[170] If the position for which we contended in part I is not correct, then all quota programs of the type at issue here violate Title VII. The OFCC cannot, by virtue of power derived from an executive order, make legal what Congress has

[170] Nor does this case present an occasion to decide whether the OFCC may *require* private parties to adopt such programs. The courts below found the program here to have been voluntarily adopted by USWA and Kaiser; throughout this case neither of those parties has claimed that OFCC forced them into the agreement, nor that OFCC lacks the authority to do so.

made illegal. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Justice Jackson, concurring). If quota programs to correct a racial imbalance are unlawful discrimination under Title VII, the OFCC has not been ordained to bless them nevertheless.

Accordingly, the outcome of this case necessarily turns upon the issue presented in part I of this brief: whether private parties may voluntarily adopt quotas to eliminate racial imbalance.

III. FINAL CONSIDERATIONS.

This brief would not be complete, without three concluding observations which cut across all of the discrete legal points discussed above.

1. The Congress which enacted Title VII knew that that Title could not, standing alone, materially reduce the economic distress of blacks and other minorities which was the impetus for its enactment. As Senator Humphrey explained, in stating the "affirmative case" for the bill:

> "The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them. This requires both an end to the discrimination which now prevails *and an upgrading of Negro occupational skills through education and training. Neither task can be given priority over the other. They are as interdependent as the chicken and the egg and must be attacked simultaneously.* Negroes cannot be expected to train themselves for positions which they know will be denied to them because of their color. Nor can patterns of discrimination be effectively broken down until Negroes in sizable numbers are available for the jobs to be filled." [171]

[171] 110 Cong. Rec. 6548 (emphasis added).

This point was reiterated throughout the debate over Title VII.[172]

Congress did not, of course, *require* that employers and unions provide preferential access for disadvantaged minorities to training programs. But it would be ironic if a law triggered by a Nation's guilt over centuries of racial injustice constituted the first prohibition of private endeavors to accelerate the elimination of the vestiges of that injustice. And it would be particularly ironic if that result were predicated upon isolated remarks of Senators Humphrey, Case, and Clark, whose anguish over the present consequences of historic discrimination was eloquently stated during the debates on Title VII.[173]

2. There is more to legislative restraint than simply leaving decision-making in private rather than public hands. There is the prospect that private decision-making—here collective bargaining—can produce results which are beyond the ingenuity or even constitutional authority of the government. This case provides a particularly apt demonstration of that truism. There would be no training program at Gramercy today were it not for the parties' quota agreement. USWA had sought such a training program for many years, but Kaiser had continually demurred on the ground that it was too costly. In consequence, all of the production employees at the plant, including Brian Weber and the entire class he represents, were without any hope of ever achieving a craft job. The negotiation of the nationwide

[172] "National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment." H.Rep. No. 914, *supra*, p. 149 (Additional Views of Republican sponsors); see also, *e.g.*, at 1639 (Representatives Reid and Lindsay); 2585 (Representative Reid); 2600 (Representative Celler); 2604 (Representative Ryan); 7241 (Senator Case); 8348-49 (Senator Proxmire); 9678 (Senator Clark); and 12615 (Senator Muskie).

[173] See, *e.g.*, *id.* at 6547-48 (Senator Humphrey); id. at 7247, 14287 (Senator Case); *id.* at 13079, 13081 (Senator Clark).

USWA-Kaiser quota program made it imperative that Kaiser establish training programs, and thereby created opportunities for whites as well as blacks which would not otherwise have come into being.

3. In our petition we stated:

> "USWA has embarked upon a nationwide program which, if allowed to continue, will soon produce a major alteration in the status of blacks in important segments of American industry. In a very few years, this nation will see a new generation of many thousands of fully trained black craftsmen. This is not a result which government has commanded (or perhaps could command), but it is a result which private, voluntary collective bargaining can produce. The court below has declared that Title VII forbids this program. It is imperative that this Court grant certiorari and decide whether that result is what Congress intended."

The statutory analysis set forth in this brief establishes that that result is *not* what Congress intended.

CONCLUSION

The decision and judgment of the court below should be reversed.

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Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

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Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 18 Fair Empl. Prac. Cas. 45 (9th Cir. 1978) 38
Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973) 60
Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) 14, 15
Washington v. Davis, 426 U.S. 229 (1976) 16
Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976) 14
Watts v. Indiana, 338 U.S. 49 (1949) 49
Weber v. Kaiser Aluminum & Chemical Corp., 571 F.2d 337 (5th Cir. 1978) 1
Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3408 (1978) (No. 78-435) ..... *passim*
Weber v. Kaiser Aluminum & Chemical Corp., 415 F. Supp. 761 (E.D. La. 1976) ..... *passim*
Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 51
White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977) 59
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951) 34

FEDERAL STATUTES:

28 U.S.C. § 1254(1) (1976) 2
29 U.S.C. § 151 (1976) 55
29 U.S.C. § 171 (1976) 55
42 U.S.C. § 2000e (1976) ..... *passim*

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CONGRESSIONAL AUTHORITIES:

115 Cong. Rec. 40031 (1969) 47
Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 35

OTHER AUTHORITIES:

44 Fed. Reg. 4422 (1979) 26
43 Fed. Reg. 49240 (1978) 25
43 Fed. Reg. 46501 (1978) 4
43 Fed. Reg. 38290 (1978) (to be codified in 29 C.F.R. § 1607) 17
Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e at 1232 (1976) ..... *passim*
41 C.F.R. §§ 60-1 to 60-2 (1978) ..... *passim*
Draft Federal Contract Compliance Manual, § 7-160.2a (October 1978) 19
Office of Federal Contract Compliance, United States Department of Labor, "Technical Guidance Memo No. 1 on Revised Order No. 4" (February 22, 1974) 25
Report of the Proceedings of the Judicial Conference of the United States (1977) 26
Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972) 26
Affirmative Action Compliance Manual for Federal Contractors (BNA), OFCCP Compliance Manual. 18
Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 Rutgers L. Rev. 465 (1968) 42
"EEOC Issues Interpretative Memorandum on Supreme Court's Two Seniority Decisions," 134 Daily Lab. Rep. A-7 (July 12, 1977) 17
Fair Employment Practice Manual (BNA) 431:73 (1974) 5, 6, 36

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The Federal Civil Rights Enforcement Effort, 1977 Report of the United States Commission on Civil Rights 25, 26

W. Gould, Black Workers in White Unions (1977) 47

H. Hill, Black Labor and the American Legal System, Vol. 1 (1977) 47

"Interpretative Memorandum of EEOC on Supreme Court Rulings in *Teamsters* v. *United States* and *United Airlines* v. *Evans*," 134 Daily Lab. Rep. D-1 (July 12, 1977) 17

Kennedy, John F., Address in Berkeley at the University of California, March 23, 1962, Public Papers of the Presidents, John F. Kennedy, 1962 53

Lieberson & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, Am. J. Soc., Vol. 73, No. 2 (1967) 53

F. Marshall & V. Briggs, The Negro and Apprenticeship (1967) 47

Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214 (1977) ..5, 21, 24

Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Col. L. Rev. 691 (1968) 14

The Potomac Institute, Affirmative Action: The Unrealized Goal (1973) 47

Preliminary Report on the Revitalization of the Federal Contract Compliance Program (1977) 25

St. Antoine, *Affirmative Action: Hypocritical Euphemism or Noble Mandate?* 10 Mich. J.L. Ref. 28 (1976) 19

S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management (1960) 47

Statement of Barry Goldstein, Assistant General Counsel, NAACP Legal Defense and Educational Fund, Before House Labor Subcommittee on Employment Opportunities, 230 Daily Lab. Rep. E-4 (November 29, 1978) 24

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Statement of EEOC Chair Eleanor Holmes Norton Before House Labor Subcommittee on Employment Opportunities, 229 Daily Lab. Rep. E-1 (November 28, 1978) 19, 24

United States Commission on Civil Rights, The Challenge Ahead (1976) 47

United States Commission on Civil Rights, Employment (1961) 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 563 F.2d 216 (5th Cir. 1977) and may be found in the Appendix to Kaiser Aluminum & Chemical Corporation's Petition for Writ of Certiorari ("Pet. App." herein) at pages 1a-46a. The denial of Petition for Rehearing and Petition for Rehearing En Banc is reported at 571 F.2d 337 (5th Cir. 1978) and is set forth at Pet. App. 47a. The Opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1976) and appears at Pet. App. 48a-64a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1977 (Pet. App. 110a). A Petition for Rehearing and a Petition for Rehearing En Banc were denied on April 17, 1978 (Pet. App. 47a). After this Court granted an extension of time to file a Petition for Certiorari, the Petition was filed on September 14, 1978. The Petition was granted on December 11, 1978, and this case was consolidated with *United Steelworkers of America* v. *Weber,* No. 78-432 and *United States* v. *Weber,* No. 78-436. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Sections 703(a), 703(d), 703(h) and 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976); Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), reprinted in 42 U.S.C. § 2000e at 1232 (1976); and Revised Order No. 4, 41 C.F.R. § 60-2 (1978) are set forth in Pet. App. 66a-109a.

QUESTION PRESENTED

May an employer and a union lawfully consider race in the selection of employees for participation in a new craft training program established in part to remedy the past exclusion of blacks from craft employment?

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation ("Kaiser" or "the Company") is a government contractor, subject to the affirmative action requirements of Executive Order 11246, as well as Title VII of the Civil

Rights Act of 1964, as amended. Employees at its Gramercy, Louisiana plant are represented by the United Steelworkers of America, AFL-CIO ("Steelworkers" or "the Union"), and include both unskilled workers and experienced, skilled craft workers. The Gramercy plant is one of fifteen Kaiser facilities covered by the 1974 Master Aluminum and Can and Container Labor Agreement ("Master Agreement") with the Steelworkers.

The work force in the Gramercy area was about 39 percent black when this case was tried in 1975. The Kaiser work force was 14.8 percent black at the time, up from 10 percent in 1969 when, under pressure from its federal contract compliance agency, the Company began hiring unskilled production workers on a one-to-one black-white ratio.[1] Despite vigorous recruiting efforts, before 1974 only 1.83 percent (five out of 273) of the skilled craft workers at the Gramercy plant were black.[2]

A significant factor in the near absence of blacks from the crafts was Kaiser's requirement that new hires for craft work have prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials.[3] Despite

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[1] Pet. App. 52a, 415 F. Supp. at 764; Pet. App. 23a-24a & n.3, 563 F.2d at 231 & n.3; Joint Appendix (hereinafter "J.A.") 60, 81-82.

[2] J.A. 167. By the time of trial, the number of craft workers had increased to approximately 290. J.A. 167. This figure was used in Kaiser's Petition for Certiorari at 3, and in Judge Wisdom's dissenting opinion. Pet. App. 24a, 563 F.2d at 228.

[3] Pet. App. 52a, 415 F. Supp. at 764; J.A. 62-63, 65, 71, 76, 93, 104.

union pressure to create craft training opportunities for unskilled production workers, Kaiser had maintained the experience requirement because of the cost of on-the-job training, estimated at $15,000 to $20,000 per trainee,[4] and its need for fully trained craft workers.[5]

In 1973, Kaiser was told by its federal contract compliance agency to eliminate the underutilization of minorities at the Gramercy plant and to assure minority representation in craft jobs at that plant by various means, including the creation of a training program.[6] At that time, Kaiser was also concerned about charges of Title VII violations at its Baton Rouge plant just north of Gramercy and about litigating a Title VII suit at its Chalmette facility to the south.[7] Concurrently, the Steelworkers were negotiating a resolution to similar charges of race and sex discrimination in the steel industry.[8] The results of the Steelworkers' negotiations were embodied in the consent decree approved in *United States* v. *Allegheny-Ludlum Industries, Inc.* which called for race- and sex-conscious selections for craft training programs.[9]

[4] J.A. 67-68.

[5] J.A. 64-65, 69-70, 75.

[6] J.A. 64, 83, 92-93. The demand for assurances of minority representation was based on requirements contained in Revised Order No. 4, Pet. App. 84a, 41 C.F.R. § 60-2 (1978). Designated federal agencies were charged with the responsibility of enforcing these requirements in various industries prior to the consolidation of this responsibility in the Department of Labor by Executive Order 12086, 43 Fed. Reg. 46501 (1978).

[7] J.A. 83. The Complaint in the suit at Chalmette was filed in federal district court in September of 1967, and the matter has been in litigation for 11 years. *See* Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978).

[8] *See* J.A. 83, 96-97.

With its own contract compliance and Title VII concerns as well as the steel industry negotiations clearly in mind,[10] the Company and the Union entered into an agreement in 1974 creating a new craft training program at the fifteen Kaiser facilities covered by the Master Agreement.[11] Although the parties expressly denied any violations of the Executive Order or Title VII they also affirmed that it was their intent "to fully comply with both the letter and the spirit" [12] of those federal laws. They further stated that the representation of minority and female employees in craft jobs "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions." [13]

By creating this new program the Company and the Union responded to the almost total absence of blacks from craft jobs.[14] They also provided craft training opportunities to incumbent white employees, such as Respondent, who did not have experience in craft

[9] United States v. Allegheny-Ludlum Indus., Inc., Consent Decree I, Fair Empl. Prac. Manual (BNA) 431:125, 138 (1974); *see* Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214, 235 (1977).

[10] J.A. 83, 97.

[11] J.A. 131, 139. (Joint Exhibits 1 and 2.) Similar agreements were negotiated concurrently by the other major aluminum producers. J.A. 94.

[12] J.A. 139.

[13] J.A. 145.

[14] J.A. 62-64, 65-66, 71, 91-92.

work.[15] These opportunities had not previously been available to anyone.

Because of the relatively greater seniority and higher proportion of white male production workers, basing admission to the new program strictly on plant seniority would have perpetuated the underutilization of blacks and women in craft jobs[16] and thereby would have defeated the stated objective of the program. For this reason, it was agreed that, as under the Steel Consent Decree,[17] black and female employees would share the trainee vacancies equally with white male employees, based on relative seniority within each group until underutilization of blacks and women was eliminated.[18] As a result, in the first year of the program at Kaiser's Gramercy plant, six white and seven black employees were admitted to the training program.[19] No black employees would have been included among those trainees if selections had been made solely on the basis of seniority.[20]

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[15] J.A 51, 66.

[16] J.A. 71-72, 87, 91.

[17] United States v. Allegheny-Ludlum Indus., Inc., Consent Decree I, Fair Empl. Prac. Manual (BNA) 431:125, 138 (1974).

[18] J.A. 137, 144-46. For ease of reference, the term "blacks" will be used in connection with the allocation of opportunities at Gramercy although under the program women and other minorities were grouped with blacks.

[19] J.A. 66, 168.

[20] The Joint Stipulation of Facts states, with respect to the bids of all Kaiser employees for positions in the craft training program, that

> [i]n each instance, with the exception of the bids for one position as Air Conditioning Mechanic, which was restricted to white bidders only, successful black bidders were junior in seniority to one or more white bidders, who bid unsuccessfully for said position.

J.A. 128. Two black employees, W. Johnson and E. Mitchell, would have qualified for the craft training program on the basis of total plant seniority. *See* Joint Exhibit 3, J.A. 156, 160, 164. Both of these employees, however, chose not to enter the program. No other black employees were senior enough to compete successfully with white employees for admission to the program.

The Respondent is a white employee who sought admission to the new training program in 1974. He was not selected although less senior minority employees were chosen.[21] His complaint followed, alleging that the failure to admit him to the training program constituted racial discrimination against him in violation of §§ 703(a), (d) and (j) of Title VII of the Civil Rights Act of 1964, as amended.

At the trial, the Company pointed to its affirmative action obligations as a federal contractor under Executive Order 11246 and demonstrated that other efforts to meet those obligations had failed. Although Company witnesses denied any prior acts of discrimination,[22] one acknowledged that before 1969 the Company

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[21] If the sole prerequisite for selection into the training program had been plant seniority, Respondent would not have been selected. Between 35 and 40 employees bidding on the three jobs on which Weber bid had more seniority. J.A. 88. Respondent's standing to bring this suit nevertheless is not at issue. A Title VII plaintiff need not be currently suffering the effects of a challenged practice if that program will impact on him in the future. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971). Moreover, this action was brought on behalf of a class. J.A. 24. Thus, another member of the class could have been substituted for Weber even if his standing were found defective. Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15-16 (4th Cir. 1972).

[22] Pet. App. 52a, 415 F. Supp. 764; J.A. 72, 77-78, 99, 108.

had selected the applicants whom it considered "best qualified" for production jobs.[23] They also conceded that the requirement of prior craft experience or training for craft applicants had a disparate impact on blacks because of their historical exclusion from craft unions.[24] No detailed justification for the disproportionately small share of Kaiser's production and craft jobs held by blacks was offered.

The District Court decided in the Respondent's favor on two grounds. First, it held that Title VII prevents employers and unions from voluntarily making employee selections based on race even if a court could require this in a litigated case or approve it in a consent decree.[25] Second, it accepted Kaiser's denial of discrimination and declared that even a court would not be authorized by Title VII to impose a race conscious remedy in the absence of a finding of discrimination against the Company. The District Court also concluded that the Company's obligations under the Executive Order must be subordinated to the specific provisions of Title VII.[26]

Kaiser and the Steelworkers appealed to the Fifth Circuit, and were joined by the United States and the Equal Employment Opportunity Commission ("EEOC") as amici.[27] The Court of Appeals rejected

[23] J.A. 78, 82.

[24] J.A. 63, 91, 93.

[25] Pet. App. 59a, 415 F. Supp. at 767-68.

[26] Pet. App. 60a-63a, 415 F. Supp. at 768-69.

[27] Pet. App. 2a, 563 F.2d at 218. Subsequently, the Government was granted the right to intervene as a party plaintiff-appellant. J.A. 175.

the District Court's holding that the scope of voluntary remedial action was more limited than that which a court could approve or impose.[28] However, in a split decision it held that, absent evidence to support a finding of prior discrimination by the Company, neither Title VII nor Executive Order 11246 would support the selection system which Kaiser and the Steelworkers had instituted in connection with the new training program.[29]

Following denial of petitions for rehearing and reconsideration en banc, petitions to this Court for a Writ of Certiorari were filed by the Company, the Union and the Government. These petitions were granted on December 11, 1978.

SUMMARY OF ARGUMENT

Title VII impels employers to eliminate or change those employment practices that adversely and disproportionately affect blacks and to increase the utilization of blacks in their work force. This Court has explicitly encouraged employer self-examination in order to produce voluntary remedial action. Such encouragement reflects both Congressional intent and the fact that attainment of the objectives of Title VII depends on voluntary action. Neither direct government supervision of the work place nor prolonged and expensive litigation is a viable alternative.

Voluntary action is not only the "preferred means" for resolving Title VII problems, but it is also expressly provided for under Executive Order 11246. Regulations issued pursuant to that Order state that

[28] Pet. App. 13a, 563 F.2d at 223.

[29] Pet. App. 14a-15a, 563 F.2d at 224.

federal contractors must eliminate underutilization of minorities and women, particularly in craft jobs from which those groups have historically been excluded.

The almost total absence of blacks from craft jobs at Kaiser's Gramercy facility posed a serious threat to the Company's contract compliance status. It also presented the clear possibility of Title VII litigation which had already embroiled two neighboring Kaiser plants and which threatened to engulf the entire steel and aluminum industries. The Company had sought to overcome the situation unsuccessfully through vigorous recruiting. Nevertheless, Kaiser's insistence on prior experience as a condition for craft work or training had produced a work force that reflected the historical exclusion of blacks from the craft unions.

The Company and the Steelworkers addressed this matter in their 1974 labor negotiations. While both parties denied liability for the situation, they agreed on a remedy in response to what they perceived to be requirements imposed by government regulations and court decisions. Their agreement took the form of a new craft training program which would enable production workers without craft experience to become craft-qualified. Although the purpose of the program was to assure that black workers would have craft opportunities, the negotiated remedy also guaranteed white production workers a 50 percent share of the trainee vacancies. In this way, the expectations of both white and black employees were significantly expanded by the 1974 agreement. Furthermore, because the craft training program was a new one, no prior expectations of white or black employees were diminished.

The Fifth Circuit majority condemned this program because of the parties' denial of liability for past discrimination and the absence of a showing that a court could have ordered such a remedy under the facts of the case. In reaching this conclusion, the court erroneously judged voluntary action by standards that are appropriate only in contested litigation. It ignored the reservoir of private authority that is fundamental to our free, pluralistic society and it misconstrued the relationship of Title VII and Executive Order 11246.

Where underutilization is present and is traceable to identified discrimination, voluntary race conscious action by employers may be required by Executive Order 11246 and is consistent with Title VII. Demanding a finding or admission of liability as a condition for approving a voluntary race conscious remedy, or restricting the benefits of that remedy to actual victims of a proven violation, would be illogical, unrealistic and counterproductive. Such a finding or admission of liability has never been required where a party chooses to enter into a consent decree, rather than to litigate to final judgment. For similar reasons it should not be required here. Otherwise, employers will face the paralyzing dilemma of choosing between waiting to be charged with discrimination against minorities or women or acting voluntarily and risking successful challenges by white males unless evidence of the employer's past discrimination is produced and not contested. Either result would add significantly to the burden on already overloaded federal agencies and would increase still further the heavy civil rights case load currently in the federal courts.

What is needed is a standard that permits an employer and union to act voluntarily within a "zone of

reasonableness": first, to make the determination that the circumstances justify the adoption of a race conscious remedy and, second, to design and implement a reasonable remedy. In this case, the presence of identified although external discrimination and the threat of legal compulsion indicate that Kaiser and the Steelworkers reasonably concluded that a race conscious remedy was needed. Additionally, the remedy was narrowly drawn to cure the problem of minority underutilization in the crafts and to do so with due regard for the interests of white employees.

This program is, in fact, a model of what can be achieved through voluntary remedial action: the melding of some of the most compelling interests of civil rights and labor management relations. As in many other kinds of situations, the Union was obliged to represent and reconcile the interests of all of its members fairly and openly. Through the collective bargaining process, the Steelworkers succeeded in obtaining the sought-after craft training opportunities for all incumbent production workers at the same time that it undertook a remedy for the obvious underutilization problem. The interests of white workers were thereby protected, indeed promoted, both in the process and in the result.

The lawfulness of the training program should not be in doubt. While it provides for racially specific selections, no other device would have enabled the parties both to provide craft training to a significant number of blacks and to utilize their seniority system to increase the opportunities for all incumbent employees. Indeed, it is programs such as this that offer the best hope of advancing that day when race conscious action

is no longer necessary to eradicate the vestiges of discrimination.

I. TITLE VII PERMITS AN EMPLOYER AND UNION WITHOUT PROOF OR ADMISSION OF LIABILITY TO ADOPT VOLUNTARILY A PROGRAM THAT PROVIDES CRAFT JOBS TO EMPLOYEES OF A CLASS PREVIOUSLY EXCLUDED BY IDENTIFIED DISCRIMINATION

A. Title VII Has Been Construed To Spur Employers And Unions To Take Race Conscious Action To Overcome The Effects Of Past Discrimination

In its first major decision under Title VII, this Court drew on precedent from civil rights voting cases [30] and unanimously declared that

> practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court has since explained that its interpretation in *Griggs* was necessary in order that

> childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

McDonnell Douglas Corp. v. *Green*, 411 U.S 792, 806 (1973).

As a result of the *Griggs* rule, employers have been held to violate Title VII in circumstances which reveal

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[30] This Court has stated that the "broad language" of Title VII "frequently can be given meaning only by reference to public law concepts." Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

more about society at large than about their particular practices or motives. Where disparate impact is found employers have been held liable for restricting job opportunities because of an employee's history of garnishment,[31] arrest record,[32] participation in a methadone maintenance program,[33] or—as in this case—lack of past craft experience or training.[34] Indeed, employers and unions have abandoned or have been enjoined from using some neutral criteria, such as a high school education requirement, which were once considered to be not only useful to the employer or union but also socially desirable.[35]

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[31] Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

[32] Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).

[33] Beazer v. New York City Transit Auth., 414 F. Supp. 277 (S.D.N.Y. 1976), *modified in part and aff'd in part on other grounds*, 558 F.2d 97 (2d Cir. 1977), *cert. granted*, —— U.S. ——, 98 S. Ct. 3121 (1978).

[34] Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 58-59 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1116-17 (N.D. Ga. 1976); Crockett v. Green, 388 F. Supp. 912, 918-21 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976). *See also* Alvarez-Ugarte v. City of New York, 391 F. Supp. 1223 (S.D.N.Y. 1975).

[35] The high school education requirement was found to violate Title VII in the *Griggs* case and many others. *See, e.g.*, Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1182 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); Dozier v. Chupka, 395 F. Supp. 836, 850 (S.D. Ohio 1975). Prior to the *Griggs* decision, employers and unions were allowed by federal officials to insist on a high school education to support stay-in-school campaigns. Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Col. L. Rev. 691, 719 (1968).

The *Griggs* decision compels employers to be sensitive to the effects of their selection criteria upon minority and white candidates. Even close scrutiny of existing employment data may be inadequate because a court may find disparate impact by reference to the "potential applicant pool" [36] or simply by reference to regional [37] or national norms.[38]

Quite apart from the impact of current selection rates, employers must recognize their vulnerability to charges of discrimination under Title VII where the statistical profile of their work force reflects underutilization of certain minority groups. Though an employer is not required by Title VII to maintain a work force which is a "mirror image" of the work force in the surrounding area, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977), there is an expectation that

> absent explanation . . . nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. Moreover, "gross statistical disparities . . . alone may . . . constitute prima facie proof of . . . discrimination," *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-08 (1977), or may bolster or restore a claim of disparate treatment. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 & n.19 (1973).

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[36] Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

[37] Griggs v. Duke Power Co., *supra*, 401 U.S. at 430 n.6.

[38] Dothard v. Rawlinson, *supra*, 433 U.S. at 329-31; Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Stevenson v. Int'l Paper Co., 516 F.2d 103, 115-16 (5th Cir. 1975).

There are, of course, exemptions and other defenses to a prima facie case of discrimination which an employer may assert. For example, the underrepresentation of minorities in an employer's work force is not unlawful if the employer can show that his selection criteria have "a manifest relationship to the employment in question," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.[39] However, these defenses have been narrowly construed and have not yet been sufficiently defined to give many employers confidence in their ability to withstand an attack. As this Court emphasized in *Washington* v. *Davis,* 426 U.S. 229, 247 (1976), it is not enough under Title VII simply "to demonstrate some rational basis for the challenged practices." It is also essential that those practices

> be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.

Id.

Even validation may not be enough. Plaintiffs may still "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). Furthermore, the EEOC has continued to insist that employers must search for alternative selection devices having less

[39] In addition, this Court's opinion in *Hazelwood, supra,* 433 U.S. at 309-13, indicates that choice of appropriate statistical standards or proper time periods of liability may sometimes provide other means of rebutting a prima facie case.

discriminatory effect and substantially equal validity [40] and some courts have held that the employer's failure to make such a search is a basis for rejecting its validation defense.[41] Employers have also been chastised for persisting in efforts to establish the job-relatedness of their selection criteria which have a disparate impact [42] and, in one case, an intent to discriminate has even been inferred from such efforts.[43]

This Court's decision in the *Teamsters* case has restored the defensibility of many seniority systems that seemed lost as a result of decisions of lower courts.[44] However, the EEOC has narrowly interpreted the scope of *Teamsters,*[45] the Departments of Justice and Labor have sought to minimize its impact in cases under

[40] 43 Fed. Reg. 38290, 38297 (1978) (to be codified in 29 C.F.R. § 1607.3B).

[41] Allen v. City of Mobile, 18 Fair Empl. Prac. Cas. 217, 222-23 (S.D. Ala. 1978); Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751, 757 (D. Conn. 1978).

[42] United States v. City of Chicago, 385 F. Supp. 543, 554-55 (N.D. Ill. 1974).

[43] Dickerson v. United States Steel Corp., 17 Empl. Prac. Dec. ¶ 8528 at 6731-33 (E.D. Pa. 1978).

[44] *See, e.g.,* Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). This Court acknowledged in *Teamsters* that the prepetuation of past discrimination resulting from the operation of a seniority system would constitute a Title VII violation under Griggs v. Duke Power Co. were it not for its interpretation of the exemption in Section 703(h). 431 U.S. 324 at 349-50.

[45] *See* "EEOC Issues Interpretative Memorandum on Supreme Court's Two Seniority Decisions," 134 Daily Lab. Rep. A-7, A-8 (July 12, 1977). The full text of the EEOC Interpretative Memorandum appears at D-1 of that issue.

Executive Order 11246[46] and courts of appeals are requiring district courts to give plaintiffs broad latitude in attacking the bona fides of seniority systems if they choose to do so.[47] As a result, the likelihood that a seniority system that perpetuates past discrimination will be held to violate Title VII is diminished but not eliminated.[48]

The pressure that results from these Title VII developments is intensified for employers which, like Kaiser, are government contractors. These companies have an additional independent obligation under Executive Order 11246 to assess any "underutilization" of minorities or women in any of their job groups[49] and to act to cure that problem in the minimum feasible time.[50] Failure to take such action can result in a finding of noncompliance and, if not remedied, the issuance of a show cause order, ineligibility for future

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[46] *See, e.g.*, United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 184 (5th Cir. 1977).

[47] Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1192 (5th Cir. 1978); Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 351-53 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). Courts have also indicated that the lawfulness of such systems may not extend to lines of progression associated with them. Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978).

[48] *See* Sears v. Atchison, Topeka & Santa Fe Ry., 454 F. Supp. 158, 180 (D. Kan. 1978); Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 822, 826 (N.D. Ind. 1977).

[49] Pet. App. 90a, 41 C.F.R. § 60-2.11 (1978).

[50] Office of Federal Contract Compliance, United States Department of Labor, "Technical Guidance Memo No. 1 on Revised Order No. 4" at 3 (Feb. 22, 1974); Affirmative Action Compliance Manual for Federal Contractors (BNA), OFCCP Compliance Manual ¶ 3-501(d) at 3:0009.

contracts, termination of contracts or debarment.[51] The availability of these sanctions means that the "inevitable thrust of affirmative action programs is to impel employers" to take race conscious action.[52]

In this still-evolving legal context, employers must be race conscious. Even if they faced only the threat of injunctive action, they would have reason to consider revising useful practices which have a disparate impact on minorities rather than endure the expense and uncertainties of litigation and the possibly greater problems resulting from an imposed remedial order. Certainly, given the encouragement of make-whole class-wide remedies,[53] the pressure for "voluntary" race conscious action is at least as compelling as this Court intended it to be when it declared in *Albemarle Paper Co.* v. *Moody, supra,* that back pay should gen-

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[51] 41 C.F.R. §§ 60-1.20, 1.24, 1.26 (1978); Executive Order No. 11246, § 209.

[52] St. Antoine, *Affirmative Action: Hypocritical Euphemism Or Noble Mandate?*, 10 Mich. J.L. Ref. 28, 34 (1976). Dean St. Antoine observed further, "Lip service is paid to the concept of nondiscrimination to the point where the conscientious employer or union must begin to feel schizophrenic, but in the end it is the 'results' that count." *Id.*

[53] Albemarle Paper Co. v. Moody, *supra,* 422 U.S. at 421. To obtain back pay, class members need only meet some minimal standards of interest and qualifications. The employer then has the burden of disproving their entitlement. International Bhd. of Teamsters v. United States, *supra,* 431 U.S. at 362. *See also* Draft Federal Contract Compliance Manual, § 7-160.2a (Oct. 1978); Statement of EEOC Chair Eleanor Holmes Norton Before House Labor Subcommittee on Employment Opportunities, 229 Daily Lab. Rep. E-1, E-8 (Nov. 28, 1978).

erally be awarded where discrimination is found in order to

> provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestige of an unfortunate and ignominious page in this country's history.

422 U.S. at 417-18 (citations omitted).

The Court's opinion in *Albemarle Paper* indicates that self-examination was intended to produce voluntary corrective action. However, it did not define the permissible scope of that action. Employers, therefore, still face the challenging task of eliminating the present effects of past discrimination against minorities and women without violating the rights of white males.[54] The inherent difficulty of this task frequently cannot be avoided by resort to subtle consideration of race and sex, as approved in some of the opinions in *Regents of the University of California* v. *Bakke*, —— U. S. ——, 98 S. Ct. 2733 (1978). While race may be used as "only one element in a range of factors" in considering applicants to a university, the flexibility

[54] In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976), Mr. Justice Marshall reminded employers that Title VII "prohibits racial discrimination against the white petitioners in this case on the same standards as would be applicable were they Negroes." However, the issue presented in this case was preserved in *McDonald* as the Court noted that the employer did not contend that it had taken the challenged actions pursuant to an affirmative action program. "We emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted," the Court cautioned. 427 U.S. 281 n.8.

inherent in those choices is often absent from the industrial work place.

An employer's discretion is particularly limited in situations where jobs are subject to bidding and eligibility procedures established in collective bargaining agreements and in past practice. Unilateral action taken to alter existing working conditions or to establish new conditions—even under the strictest form of government compulsion—have been resisted by unions through costly and disruptive strikes [55] and litigation.[56] An employer who fails to seek union concurrence in such matters invites new problems.[57]

[55] *See* Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337, 339-40 (D.D.C. 1968); United States v. Building & Constr. Trades Council, 271 F. Supp. 447, 449 (E.D. Mo. 1966).

[56] *See* EEOC v. AT&T, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd in part and rev'd and remanded in part*, 506 F.2d 735 (3d Cir. 1974) where the unions' right to intervene to object to portions of a consent decree initially entered in 1971 was sustained. Their challenge was subsequently rejected in EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, —— U.S. ——, 98 S. Ct. 3145 (1978).

[57] Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214, 235 (1977) ("Where the union is not a party to the agreement, whether it be a court order, a conciliation agreement, or other form of agreed-upon settlement, the resulting problems can be horrendous."). *See also* Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, United Rubber Workers, 565 F.2d 913, 917 (5th Cir. 1978) (conciliation agreement between employer and EEOC, to which union was not a party, held not to override contradictory provisions in collective bargaining agreement; arbitration of "all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the [collective bargaining] agreement" ordered); McAleer v. AT&T, 416 F. Supp. 435 (D.D.C. 1976) (male who was entitled to promotion under collective bargaining agreement, but lost promotion to female under EEOC-AT&T conciliation agreement, to which union was not a party, held to have a cause of action against AT&T for damages).

The most stubborn barrier to subtle consideration of race and sex in many employment situations is seniority, because it is frequently the decisive factor in allocating job opportunities among equally qualified incumbent employees. Seniority leaves no middle ground for discretion: It either controls within prescribed limits or it does not; race and sex are either factored into the decision to a specified extent or they are ignored.

This aggregation of rights, obligations, interests and expectations inevitably produces conflicts among the parties concerned. There may well be disagreement as to whether any corrective action is required and if so of what form and scope it should be. Moreover, employers who do not take corrective action may be charged with violating the rights of minority workers. Those who act voluntarily may be charged with discriminating against nonminority employees. One means of resolving this dilemma is through costly and lengthy litigation.[58] If this is the only option, however, the benefits of voluntary action, which this Court so clearly contemplated in *Albemarle Paper* and other cases, will be lost.

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[58] In his dissent from the majority decision below, Judge Wisdom noted that unless that decision is reversed employers may have no alternative other than to wait to be sued or to seek a declaratory judgment. Pet. App. 27a, 563 F.2d at 230. In either event, much time and expense could be required to resolve the situation. Even where the employer's plan has EEOC approval, resolution of disputes through declaratory judgment actions may take several years. *See* Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, United Rubber Workers, 565 F.2d 913 (5th Cir. 1978); Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Central Power & Light Co., 425 U.S. 987 (1976).

B. Voluntary Action Is Vital To The Implementation Of Title VII And Other Federal Laws Intended To Achieve Equal Employment Opportunity

This Court has recognized that "cooperation and voluntary compliance were selected as the preferred means" for achieving the objectives of Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[59] Voluntary compliance is more explicitly contemplated under Executive Order 11246.[60] Government contractors and subcontractors not only are prohibited from discriminating on the basis of race, religion, national origin or sex, but also are obligated to take "affirmative action" to ensure against such discrimination.[61]

There are several reasons for this emphasis on voluntary action:

(1) The nation's ultimate objective is an economy that is free from race, ethnic, sex or religious prejudice and that operates with minimal government regulation.

(2) Employers and unions are usually the most knowledgeable parties about changes in their em-

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[59] *See also* Hutchings v. United States Indus., Inc., 428 F.2d 303, 309 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Dent v. St. Louis-San Francisco Ry., 406 F.2d 399, 402 (5th Cir. 1969), *cert. denied*, 403 U.S. 912 (1970), *rehearing denied*, 404 U.S. 875 (1971).

[60] Pet. App. 78a, Executive Order 11246, § 209(b); 41 C.F.R. §§ 60-1.20(b), 60-1.24(e)(2) (1978).

[61] Pet. App. 70a, Executive Order 11246, § 202; Pet. App. 84a-109a, Revised Order 4, 41 C.F.R. § 60.2 *et seq.* (1978).

ployment practices that need to be made and how best to make them.[62]

(3) Private parties can act voluntarily much more quickly and efficiently than is possible through orders emanating from the administrative or the judicial process.

(4) Voluntary compliance conserves administrative and judicial resources for those situations which require enforcement action.

The last two reasons—efficiency and conservation of resources—are increasingly important. Their relationship to the first reason—the realization of equal employment opportunity—is self evident: Efficient use of administrative and judicial resources is imperative if federal efforts to promote equal employment opportunity are to succeed. From the time of its establishment in 1965 the EEOC has been swamped by a rising tide of charges. It has only recently begun to reduce this problem by narrowing the focus of its investigations and by deferring further actions against systemic discrimination.[63] The Department of Labor, which is responsible for enforcing Executive Order 11246 with

[62] "Courts are generally less competent than employers to restructure business practices . . ." Furnco Constr. Corp. v. Waters, —— U.S. ——, 98 S. Ct. 2943, 2950 (1978). *Cf.* Moore, *supra*, 3 Employee Rel. L.J. at 235. *See* discussion of importance of collective bargaining in this context at 55-58 below.

[63] Statement of EEOC Chair Eleanor Holmes Norton before House Labor Subcommittee on Employment Opportunities, 229 Daily Lab. Rep. E-2, E-8 (Nov. 28, 1978); Statement of Barry Goldstein, Assistant General Counsel, NAACP Legal Defense and Educational Fund before House Labor Subcommittee on Employment Opportunities, 230 Daily Lab. Rep. E-4 (Nov. 29, 1978).

respect to approximately 275,000 supply and service contractors and 50,000 building construction contractors,[64] has been similarly shorthanded. As a result, in 1976 only about 10 percent of the contractors covered by the Executive Order were the subject of compliance reviews,[65] and enforcement proceedings against allegedly noncomplying contractors were still lagging a year later.[66]

The attention devoted to defining the affirmative action responsibilities of government contractors has also been obviously limited. Apart from the issuance and subsequent revision of Order No. 4,[67] and the release of a series of technical guidance memoranda,[68] little has been done to define those actions that nonconstruction contractors must take to comply with their obligations under the Executive Order.[69] Even

[64] The Federal Civil Rights Enforcement Effort, 1977 Report of the United States Commission on Civil Rights at 100.

[65] *Id.* at 113.

[66] *Id.* at 139-43. While the recent consolidation of Executive Order responsibilities in the Department of Labor, 43 Fed. Reg. 49240 (1978), may well improve the administration of the Executive Order, limitations of staffing will continue to force difficult choices as to priorities.

[67] Pet. App. 84a-109a, 41 C.F.R. § 60-2 *et seq.* (1978).

[68] *See, e.g.*, Office of Federal Contract Compliance, United States Department of Labor, "Technical Guidance Memo No. 1 on Revised Order No. 4" (Feb. 22, 1974).

[69] Over a year ago a Special Task Force recommended to the Secretary of Labor that demographers be employed to study availability data and to "set benchmarks for industrial job groups by labor market areas." Preliminary Report on the Revitalization of the Federal Contract Compliance Program (1977) at 78. No action has yet been announced on that recommendation. No estimate was included or has subsequently been released of the staffing or budget needed to implement this recommendation.

in the construction area where enforcement efforts were first focused, the government has been able to establish specific goals in only seven of 103 target areas.[70] Instead, it has been forced to rely on "hometown" plans that have been voluntarily developed in only thirty-five additional areas.[71]

The courts at every level are deluged by the volume of civil rights and other litigation. From 1972 to 1977 the number of employment discrimination cases filed in federal district courts increased by more than 580 percent.[72] The burden at the appellate levels is equally alarming.[73]

Administrative agencies and the courts may provide more guidance than they have in the past.[74] There is,

[70] Philadelphia, Pa.; Washington, D.C.; Atlanta, Ga.; St. Louis, Mo.; San Francisco, Ca.; Camden, N.J.; and Chicago, Ill. The Federal Civil Rights Enforcement Effort, *supra* at 127.

[71] *Id.* at 126. The Special Task Force also recommended to the Secretary of Labor in 1977 that goals for minority and female participation by construction trade be promulgated for each area in which a construction contract is to be performed.

[72] Report of the Proceedings of the Judicial Conference of the United States (1977), Table 25 at 219-20. This represents an increase from 1015 cases filed in 1972 to 5931 filed in 1977.

[73] *See* the dissenting opinion of Mr. Justice Stevens to the Court's *per curiam* opinion in Board of Trustees v. Sweeney, —— U.S. ——, 99 S. Ct. 295, 296 (1978); the dissenting opinion of Messrs. Justices White and Blackmun to the Court's denial of certiorari in Brown Transp. Corp. v. Atcon, 47 U.S.L.W. 3387 (Dec. 5, 1978) (No. 77-1581); Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972).

[74] The EEOC has belatedly recognized its responsibility to issue affirmative action guidelines. 44 Fed. Reg. 4422 (1979). However, these guidelines generally leave employers and unions to decide when their situation calls for affirmative action and provide little insight into the level or extent of goals which should be included in affirmative action plans or the selection devices which are appropriate to attain those goals.

however, no reasonable prospect that the situation will improve significantly in the future. The growing awareness of and commitment to the vindication of civil rights will probably produce increasing numbers of issues and complaints as we move from a segregated economy to one that is truly integrated. Moreover, it is unrealistic to expect compliance officials or judges to assess the situation at each facility of each employer; to determine how much of present underutilization is attributable to past discrimination by the employer or union; to identify the victims of such discrimination; and to devise an appropriate set of remedial actions. Instead, employers and unions must generally be expected to analyze their own situations and to develop and implement reasonable affirmative action programs in the light of that analysis. This expectation can be realized only if the conditions which govern employer and union self-analysis and self-prescription are not self-defeating.

C. Voluntary Race Conscious Action Is Lawful Under Title VII

The Court of Appeals in this case ostensibly recognized the need for voluntary action when it reversed the trial court's ruling that employers and unions could not adopt race conscious remedial programs without judicial authorization. It expressly acknowledged that "voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII."[75]

This acknowledgment is gutted, however, by the majority's additional holding that race conscious action

[75] Pet. App. 13a, 563 F.2d at 233.

is permissible only if a court could have ordered it to remedy a defendant's past discrimination. As a practical matter, this requirement will effectively suppress most voluntary race conscious action because of the difficulty of predicting judicial determinations of liability and remedy and the consequences of confessing to Title VII liability. As a legal matter, the majority's analysis is equally faulty because the range of situations in which private action is permissible is greater than the range of situations in which a court may order the parties to act. Employers and unions are free to act subject only to restraints imposed by the mandates and prohibitions of law. In contrast, a court may act only where a violation of law has occurred or is about to occur, for which the law prescribes the action as a remedy.

This contrast is stark in the context of Title VII. Although courts have "plenary powers to secure compliance" with the Act,[76] a court could not have ordered Kaiser and the Steelworkers to establish a training program to increase opportunities for minorities and women in the face of its own finding that neither of them had discriminated against those groups.[77] Nor would Title VII authorize courts to order employers or unions to abandon qualification standards that are significant measures of job performance simply to provide for proportional selection of minority or female

[76] Alexander v. Gardner-Denver Co., *supra*, 415 U.S. at 45.

[77] But note that courts have ordered the establishment of training programs to overcome the effects of past discrimination for which the employer has been found to be responsible. Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd per curiam*, 476 F.2d 1287 (5th Cir. 1973).

applicants.[78] But this conclusion does not necessarily condemn such action if it is undertaken voluntarily.

This Court has recognized the distinction between the scope of private and judicial action under Title VII and in other contexts. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1977), it observed that employers and unions may themselves go further to enhance "the seniority status of certain employees for purposes of furthering 'public policy' than Title VII would require, even when their action was "detrimental to the expectations acquired by other employees under the previous seniority agreement." 424 U.S. at 778-79. Similarly, in connection with school integration policies, Mr. Chief Justice Burger, writing for a unanimous Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), noted that as a matter of educational policy, school authorities may require "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole" even though a federal court could not order such a remedy in the absence of a Constitutional violation.[79]

The question here is not, therefore, what a court could have done under the circumstances, but whether

[78] "Secretaries must be able to type. There is no way around that necessity." Local 189, Papermakers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *see also* Furnco Constr. Corp. v. Waters, —— U.S. ——, 98 S. Ct. 2943 (1978).

[79] A majority of the Court approved a similar result in *Bakke*, *supra*. Although it is clear that no court could have ordered the medical school to use race as a factor in selecting students for admission in light of the facts of that case, the school's freedom to do so for policy reasons was confirmed. 98 S.Ct. at 2764.

what Kaiser and the Union did violated Title VII. Contrary to the opinion of the Fifth Circuit, the answer is "no" for two reasons: (1) Employers and unions may voluntarily take race conscious action to remedy identified discrimination without a prior finding or admission that they are liable for the discrimination; and (2) race conscious action may benefit persons who were not victims of the discrimination identified.

1. Employers And Unions May Voluntarily Take Race Conscious Action To Remedy Identified Discrimination Without A Prior Finding Or Admission Of Their Liability

Race conscious action to remedy past discrimination has been upheld repeatedly by this Court.[80] The importance and lawfulness of voluntary remedial action pursuant to Executive Order 11246 and Title VII have also been stressed.[81] However, according to the Fifth Circuit majority, Title VII precludes voluntary race conscious action by an employer and union to remedy more than their own discrimination. Asserting that a race conscious measure that exceeds those limits "loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference*," the Court of Appeals held that such a preference cannot be justified by the effects of "societal discrimination" on blacks.

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[80] This observation was made in several of the opinions in *Bakke, supra*. *See* 98 S. Ct. at 2754 (Powell, J.), 2766, 2779-81 (Brennan, White, Marshall & Blackmun, JJ., concurring in part), 2804 (Marshall, J., concurring in part), 2808 (Blackmun, J., concurring in part); *see also* United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 159-62 (1977) (White, J.), 171 (Brennan, J., concurring in part); Lau v. Nichols, 414 U.S. 563 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra*, 402 U.S. at 16; McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

[81] *See* discussion, *supra* at 23-24.

This analysis suggests a degree of clarity that does not currently exist about the line between unjustifiable importation of external discrimination into the work place and business necessity. As suggested earlier, what distinguishes "unlawful" quotas to attain racial balance from "lawful" quotas to correct past discriminatory practices[82] is often only one's perception of the adequacy of an employer's or union's justification for the employment practice that produced a racial imbalance.[83] The difficulty and expense of establishing or even fully assessing such a justification may be considerable,[84] and the outcome of that process is often unpredictable before litigation.

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[82] The majority below noted that several circuits have held that "quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not." Pet. App. 9a, 563 F.2d at 221 (citations omitted).

[83] *See* discussion, *supra* at 13-22.

[84] In discussing the issue of job-relatedness in Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751, 755 (D. Conn. 1978), Judge Daly stated:

> In search of an answer, the attorneys and the Court have been led by the conflicting testimony of two experts, who spoke in an alien tongue through a labyrinth of statistical analysis that might well have intimidated Odysseus.

In the decision below, Judge Wisdom observed in his dissent that

> [d]ivining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen

Nevertheless, to say that an employer may act to correct a situation, despite questions about his liability for creating it, is not to say that he may act without cause or for purely altruistic reasons. Race conscious action should plainly be confined to situations in which it is genuinely remedial. This means that identified discrimination [85] must exist, as it did in this case.[86]

The training program challenged here was implemented in a context in which the Congress, administrative agencies and the courts have all determined "that past discrimination has handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past

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separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

Pet. App. 27a; 563 F.2d at 230.

[85] As Mr. Justice Powell recently noted in Regents of the Univ. of Cal. v. Bakke, *supra*, 98 S. Ct. at 2754-55 n.40:

> Every decision upholding the requirement of preferential hiring under the authority of Executive Order 11246 has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association, supra; Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F.2d 680 (C.A.7 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (N.J. 1970); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E. 907, *cert. denied*, 396 U.S. 1004, 90 S. Ct. 554, 24 L. Ed.2d 495 (1970). See also *Rosetti Contr. Co.* v. *Brennan*, 408 F.2d 1039, 1041 (C.A.7 1975); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9 (C.A.1 1973), *cert. denied*, 416 U.S. 957, 94 S. Ct. 1971, 40 L. Ed.2d 307 (1974); *Northeast Const. Co.* v. *Romney*, 157 U.S. App. D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

[86] *See* discussion at 46-49 below.

discrimination." [87] That determination was part of the basis for the federal compliance regulations with which Kaiser and the Steelworkers were trying to comply.[88] Those regulations direct the employer to remedy underutilization regardless of whether it results from the contractor's discrimination; [89] they also require him to give special attention to craft jobs in his work force analysis and goal setting [90] because minorities and women are most likely to be underutilized in those jobs. In upholding the Philadelphia Plan,[91]

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[87] Regents of the Univ. of Cal. v. Bakke, *supra*, 98 S. Ct. at 2758 n.44 (Powell, J.).

[88] The Memorandum of Understanding between Kaiser and the Steelworkers states:

> [T]he Joint Company-Union Implementation Committee has reviewed all of the existing Trade, Craft, and Assigned Maintenance classifications with respect to their representation of minority and female employees. Said review has determined that, notwithstanding the efforts made by the company and the union and/or the gains made via the company's various affirmative action plans per EO 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the government and recent court decisions.

J.A. 144-45.

[89] Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The requirement to eliminate underutilization, within appropriate limits, can be based on the public interest in assuring "utilization of all segments of society and the available labor pool." EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

[90] Pet. App. 90a, 41 C.F.R. § 60-2.11 (1978).

[91] Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 177. The Fifth Circuit described and subscribed to the decision in *Contractors Ass'n*, but reached an inconsistent conclusion.

the Third Circuit approved such requirements and made it clear that evidence of discrimination need not be supplied by or attributed to the contractors who are directed to take race conscious action.[92]

The requirements imposed on government contractors pursuant to the Executive Order must, of course, be reconciled with the provisions of Title VII. Although the statute prevails in the case of a clear conflict,[93] such conflicts should be inferred reluctantly.[94] Congress was aware that government contractors were subject to affirmative action obligations when it enacted Title VII in 1964,[95] and, significantly, it provided in § 703(j) only that *Title VII* did not *require* actions to reduce work force imbalances. Accordingly, as the Third Circuit held in *Contractors Association,* this provision imposes no limits on the Executive Order program.[96] Moreover, Congress has rejected amendments to Title VII that would have put such a

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[92] To the same effect, *see* Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972). The position of Kaiser in recruiting skilled craftsmen in Louisiana is arguably quite similar to that of some contractors trying to staff a construction project in Philadelphia. Neither is in control of the labor supply.

[93] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951).

[94] *Id.* at 595 (Frankfurter, J., concurring).

[95] Section 709(d) of Title VII reflected Congressional awareness of the contract compliance program by providing that the reporting requirements of the Act would not apply to employers who are required to file reports under Executive Orders forbidding employment discrimination by federal contractors.

[96] 442 F.2d at 172.

restriction on affirmative action that is required under the Executive Order.[97]

The flaws in the Fifth Circuit's conclusion are also highlighted by judicial consideration of Title VII consent decrees. Many courts have entered decrees ordering employers and unions to change their em-

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[97] During Congressional consideration of the 1972 amendments to Title VII, two proposals by Senator Ervin to prohibit quotas and goals like those contemplated in Order No. 4 (and implemented in the Philadelphia Plan) were defeated by a two-to-one margin. Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1074, 1716.

Senator Ervin explained that his first proposal would

> prevent any department, agency, or office [*sic*] of the United States from requiring an employer to practice discrimination in reverse by employing persons of a particular race or a particular national origin or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges.

Id. at 1043-44. Senator Javits responded that the amendment must be rejected because

> it would undercut the whole concept of affirmative action as developed under Executive Order 11246. . . .

Id. at 1048.

Senator Ervin's explanation of his second proposed amendment was similar to that offered for his first. *Id.* at 1713. Again, Senator Javits was the chief spokesman for the opposition, saying:

> We have held that . . . the Federal Government . . . has discretion as to whom it will contract with and will not contract with, to affirmatively encourage non-discrimination and full utilization of minority group employees and women. So we—and the courts have sustained us—permitted the Federal Government to put into effect an affirmative action plan.

Id. at 1715. Senator Javits' position on this amendment also prevailed overwhelmingly, and the Senate rejected any suggestion that Title VII should bar contract compliance agencies from requiring "fixed or variable numbers, proportions, percentages, quotas, goals or ranges."

ployment practices for the benefit of minorities and female employees without having found that the defendants acted unlawfully, and despite the denial in the decree that such discrimination occurred. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir.), *cert. denied*, 425 U.S. 944 (1975);[98] *EEOC* v. *AT&T*, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom. Communications Workers of America* v. *EEOC*, —— U.S. ——, 98 S. Ct. 3145 (1978).

Judge Higginbotham addressed this matter directly in disposing of the contention that the *AT&T* decree went too far in subordinating seniority to the attainment of affirmative action promotion goals. He noted that denials of unlawful conduct are "a standard feature" in consent decrees, that the Supreme Court has held that "the failure of a defendant to admit liability does not affect the validity of the consent decree,"[99] and that "very few consent decrees would be negotiated if an admission of liability by the defendants was a *sine qua non*."[100] Moreover, he declared that the intervenors' attack on the *AT&T* consent decree had "arguable legal merit" only because the decree was the product of conciliation rather than litigation. Reasoning that it would surely be incongruous if the use

[98] While the majority below stated that the steel consent decree eliminated "patterns and practices of discrimination in the steel industry," Pet. App. 13a, 563 F.2d at 223, the decree does *not* contain any finding to that effect and instead includes an express denial by each of the defendants of such discrimination. Fair Empl. Prac. Manual (BNA) 431:125 (1974). For similar provisions in the *AT&T* decree *see id.* 431:73.

[99] *Citing* Swift & Co. v. United States, 276 U.S. 311, 327 (1928).

[100] 419 F. Supp. at 1038 n.16.

of a Congressionally desired means would leave the result vulnerable to attack on "the ground that the Congressional intent had been violated," Judge Higginbotham concluded that it would "frustrate the purposes of Title VII to treat the absence of evidence about AT&T's discrimination . . . and AT&T's denial of liability for such discrimination, as insuperable obstacles to the ordering of affirmative action."[101]

Courts should take at least as broad a view of the situation when voluntary affirmative action by employers and unions is challenged by those who think it violates Title VII. Employers and unions cannot be expected to concede discrimination in circumstances justifying voluntary action any more than they can be expected to admit discrimination as part of a consent decree. Nor should they be forced to invite governmental agencies or civil rights organizations to intervene and charge them with past discrimination. Indeed, such a development would present them with a Hobson's choice. If they defend their past actions successfully, their affirmative action plan may be rejected. If they fail to defend their past actions adequately, they may incur liability or at least encourage litigation and allegations of discrimination. Thus, under the Fifth Circuit's standard, "[t]he employer and the union are made to walk a high tightrope without a net beneath them."[102]

If this situation is to be avoided, employers must be given adequate leeway to take race conscious action. In deciding how much leeway to give them, courts must

[101] 419 F. Supp. at 1039-40.

[102] Pet. App. 26a, 563 F.2d at 230.

recognize that the value of voluntary action—like the value of consent decrees—will be lost if a meticulous assessment must be made of whether the remedial action being taken is precisely calibrated to any discrimination for which the employer or union might be liable. In addition to the time needed to evaluate the merits of possible defenses to underutilization, such a judgment would require tedious determinations of the injuries which occurred within remediable time periods and the amount of relief appropriate for such non-time-barred injuries.[103]

This kind of analysis usually cannot be avoided in contested litigation. It is counterproductive, however, to require it in cases that involve consent decrees or voluntary action. If employers and unions are held to the stricter standards of court-ordered remedies, voluntary action will be paralyzed. As the Fifth Circuit pointed out in *Florida Trailer & Equipment Co.* v *Deal*, 284 F.2d 567, 571 (5th Cir. 1960), parties would be hesitant to explore the likelihood of settlement if they feared that, in order to approve the agreement, the court would have to determine "that there was no escape from liability or no hope of recovery and hence no basis for a compromise." Whether or not uncertainty is conducive to the attainment of Title VII goals,

[103] Timeliness issues abound and could occupy courts and litigants indefinitely, *e.g.*, distinguishing between the effects of pre-Act and post-Act discrimination as indicated by International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and determining the application of the appropriate period of limitations for liability and remedial purposes. *Compare* United Air Lines v. Evans, 431 U.S. 553 (1977), *with* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) *and* Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 18 Fair Empl. Prac. Cas. 45 (9th Cir. 1978).

it is a fact. Judicial recognition of this situation is essential if a realistic assessment is to be made of the permissible scope of voluntary action. It should result in the courts declaring unlawful only those measures which, under the circumstances, are clearly excessive or unreasonable.[104]

In summary, where underutilization is present and can be traced to identified discrimination, voluntary race conscious action by employers is contemplated by Executive Order 11246 and is consistent with Title VII. To condition such action on an employer's actual or assumed responsibility for the underutilization would be illogical, unrealistic, and counterproductive.

2. Race Conscious Action Need Not Be Limited To Restoring Victims Of Past Discrimination To Their Rightful Places

The Fifth Circuit majority imposed an additional limitation on the scope and even the possibility of voluntary race conscious action by holding that Title VII requires race conscious action to be limited to those who were the victims of past discrimination.[105] This limitation either ignores or misconstrues a long line of cases, including some from the Fifth Circuit itself, in which the benefits of race conscious remedies were not limited to those who were themselves victimized by the practices.[106]

[104] *See* discussion of this standard at 45-46 below.

[105] Pet. App. 16a-19a, 563 F.2d at 224-27.

[106] United States v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978), *petition for cert. filed*, 46 U.S.L.W. 3766 (U.S. June 13, 1978) (No. 77-1718); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (June 20, 1978) (No. 77-1553); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, —— U.S. ——, 98 S. Ct. 3145 (1978); United States v.

Title VII relief is meant not only to compensate or to make whole individuals, but also "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429-30. *See also Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 783; *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 417. This "prophylactic" objective—which this Court has called "the primary objective of Title VII"—is a partner to the goal of making whole individual victims of discrimination, but it reaches beyond the person to the class. Compensation of an individual for harm he suffered does not assure persons of his race equal access to employment opportunities. Disadvantage to the group lingers long after the injury to the individual has been enjoined and paid for.

A number of courts have specifically recognized that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief." *Carter* v. *Gallagher,* 452

City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied sub nom.* Arado v. United States, 434 U.S. 875 (1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Patterson v. Newspaper & Mail Deliverers, 514 F.2d 767 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) (en banc); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

F.2d 315, 330 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972). *Accord, Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3780 (June 20, 1978) (No. 77-1553). Addressing this issue under the Executive Order, the Third Circuit concluded that the "broader governmental interest" in full utilization of all segments of the work force "is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination." *EEOC* v. *AT&T, supra,* 556 F.2d at 175.

This Court has not yet ruled on the bounds or means of appropriate prophylactic remedies under Title VII or the Executive Order but it has never suggested that the limitation imposed by the Fifth Circuit in this case is appropriate.[107] In fact, in none of the Executive Order cases cited with approval by Mr. Justice Powell in *Bakke* were goals restricted by the concept of individual entitlement. *See, e.g., Contractors Association* v. *Secretary of Labor, supra; Southern Illinois Builders Association* v. *Ogilvie, supra; Associated General Contractors, Inc.* v. *Altshuler, supra.*[108] Those cases implicitly recognized that racial employment goals by

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[107] To prescribe the limits of individual entitlement to compensation for past discrimination, as this Court did in *Teamsters,* is not to define the scope of appropriate prophylactic action. Only Title VII remedies to individual victims of discrimination were at issue in that case. There, this Court held that even the legitimate expectations of white employees may be intruded upon to the extent necessary to make whole those individual victims. The court in *Teamsters* did not address what kinds of relief might be "necessary to ensure the full enjoyment of the rights protected by Title VII." 431 U.S. at 361.

[108] The substantial federal interest in the voluntary achievement of the goals of equal employment opportunity was articulated by the Congress in Title VII and by presidents since 1941 through

their nature are not concerned with redressing injury to individuals but with changing the composition of a work force. They reflect an awareness that overcoming conditions that operate to the disadvantage of an identifiable group or class frequently requires the presence of that group in the work force in significant numbers. Until that situation exists others may be deterred from applying or even seriously considering the possibility of doing so.[109] Race conscious selection of job candidates can achieve that result in a reasonable time period. Though difficult questions arise regarding the rate of selection of members of underutilized groups and how long such a system should continue, these problems should not obscure the fact that race conscious selections may be the only mechanism available to guarantee that the barriers to minorities have been genuinely eliminated.[110]

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the federal contract compliance program. These goals include the full utilization of minorities and women throughout the work force. It is complemented by a separate national policy objective to narrow the economic gap between white and minority and male and female workers. The affirmative action obligations of federal contractors like Kaiser have been recognized and upheld repeatedly by the courts for the additional reason explained by the Third Circuit in *Contractors Association*: The federal government has an interest in assuring that it has available the largest possible pool of qualified workers for the performance of its projects. *See* discussion of this interest in 442 F.2d at 169-71.

[109] Professor Blumrosen has analogized the minimum level of minority or female representation in a work force or job group that will produce meaningful free choice to the "take off point" in developing countries when foreign aid may be reduced or eliminated. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 Rutgers L. Rev. 465, 488 (1968).

[110] *See* NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

This conclusion has been reached in numerous cases where race conscious action not limited to former unsuccessful applicants has been ordered to overcome substantial underutilization of minorities or women in entry level jobs.[111] The situation is no different where, as here, the jobs at stake are entry level jobs which the Company and the Union have agreed to make available for bidding by incumbent employees in order to afford them additional opportunities.[112] In these situations, as in the case of hiring, the focus should be on the reasonableness of the action[113] and on the substantial public interest being furthered by the race conscious measure at issue.

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[111] *See* cases cited note 106 *supra*. Similarly, there is no suggestion in Mr. Justice Powell's opinion in *Regents of the Univ. of Cal.* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978), that those students who may be admitted to medical school hereafter at least in part because race is "a factor" in their selection must demonstrate that they were previously the victims of discrimination. This is readily understood, since the legitimate objective sought to be achieved there—diversity of the student body—is not pegged to the harm suffered by any individual. It is an objective that exists independently and for its own sake.

[112] *Cf.* EEOC v. AT&T, *supra*. Quotas have been used in the construction industry to reorder priorities for referring workers to new assignments. United States v. Elevator Constructors Local 5, *supra;* Contractors Ass'n v. Secretary of Labor, *supra;* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, *supra*.

[113] *See* cases cited note 106 *supra*. *See also* this Court's recent decision in United Jewish Organizations, Inc. v. Carey, *supra*, 430 U.S. at 155, where the Court held that the use of racial quotas to effect legislative reapportionment is permissible.

II. THE TRAINING PROGRAM ADOPTED BY KAISER AND THE STEELWORKERS MEETS THE APPROPRIATE STANDARDS FOR JUDGING THE LAWFULNESS OF VOLUNTARY AFFIRMATIVE ACTION

Court-ordered or -approved remedies involving racial preferences have already been carved out of the concept of unlawful discrimination.[114] Various explanations have been offered for this seeming exception to the prohibitions of Title VII, but underlying each explanation is the simple fact that it is not possible to eradicate the disparate effects of past practices on minorities without race conscious remedies.[115] This fact is equally true whether the remedy in question is entered by a court or adopted voluntarily.

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[114] *See* discussion, *supra* at 32-43.

[115] Some courts have reasoned that the prohibitions against race consciousness embodied in §§ 703(a) and 703(j) define violations, but do not limit remedies. *See, e.g.*, United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1019-20 (3d Cir. 1976). Others have concluded that prohibition of remedial race conscious action would frustrate Title VII's broad prophylactic purpose and could not have been contemplated by Congress. United States v. IBEW Local 38, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). Still others have relied upon the legislative history described in note 97 *supra*. *See, e.g., Elevator Constructors, supra*, 538 F.2d at 1019-20. Finally, in his dissent below, Judge Wisdom argued that remedial race consciousness may be characterized as the drawing of distinctions based on past discriminatory status, using race as a proxy for that status. *See* Pet. App. 38a-39a; 563 F.2d at 235. Whatever the precise argument chosen, the principles underlying all of them are the same: Because "Congress did not intend to freeze an entire generation of Negro [or other protected group] employees into discriminatory patterns that existed before the act," Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968), and because reading Title VII in a "color blind" fashion would "freeze the status quo and . . . foreclose remedial action," Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 173, race must be taken into account in some circumstances.

It is not enough merely to establish the need for voluntary action. Even the courts do not have unfettered discretion in framing race conscious remedies,[116] although the relevant standards have not been consistently articulated. If there is a thread running throughout the decisions, however, it is a requirement that the remedy be necessary and that neither injunctive nor compensatory relief be sufficient.[117]

In a nonlitigated situation, such a standard would be counterproductive for it would require the kind of proof that would deter voluntary action and diminish its value.[118] What is needed instead is what Judge Wisdom described as a "zone of reasonableness," that is, an area in which employers and unions can act provided that (1) their situation calls for some remedy for identified discrimination and (2) they choose a remedy adapted fairly to the circumstances.

This kind of standard is comparable to that which the courts have traditionally utilized in determining whether a collective bargaining agreement fairly adjusts the interests of different classes of employees. In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953), for example, the Court rebuffed an attack on a revision of seniority rights among various groups of employees, saying that

> [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete

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[116] *See* Sledge v. J.P Stevens & Co., 585 F.2d 625, 647 (4th Cir. 1978).

[117] *See id.* at 646-47; NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974).

[118] *See* discussion, *supra* at 37-39.

good faith and honesty of purpose in the exercise of its discretion.[119]

This "zone of reasonableness" standard should be utilized in answering two critical issues here: (1) Was the determination by Kaiser and the Steelworkers to take race conscious remedial action reasonable under the circumstances? and (2) Was the remedy they adopted a reasonable one? In both cases, the answer is yes. First, the parties acted reasonably given the presence of identified though external discrimination and the threat of legal compulsion. Second, the remedy was reasonably tailored to cure the problem and to do so with due regard for the interests of white employees.

A. The Company And Union Reasonably Decided To Adopt A Race Conscious Remedy Under The Circumstances Of This Case

1. The Existence Of Identified Discrimination Was Established

The *Bakke* case involved a program that depended on a generalized concept of social disadvantage inferentially linked to the small number of minority doctors. Such an "amorphous concept of injury" to minority groups was distinguished by Mr. Justice Powell from conditions present in cases such as *Contractors Association, supra,* which involved "identified discrimi-

[119] *Cf.* Humphrey v. Moore, 375 U.S. 335, 350 (1964). The Court held that, after the consolidation of the operations of two companies, the union could lawfully favor meshing the two seniority lists, even though the combined seniority system disadvantaged some union members. Mr. Justice White, writing for the Court, observed that the decision to "dovetail" the seniority lists was not "arbitrary discrimination," even though the combined seniority system disadvantaged some union members. The situation is not significantly different when a majority group member alleges that affirmative action constitutes racial discrimination against him. *See* note 145 below.

nation." In the latter situation, remedial action is lawful; in the former, it is not.[120]

There can be no doubt which situation Kaiser and the Steelworkers faced. The record in this case reveals that a history of very specific wrongs [121] had resulted in a clearly defined deprivation.[122] This, in turn, created

[120] Even the latter kind of situation does not necessarily involve identified *victims* of discrimination.

[121] The historical exclusion of blacks from the crafts is documented in many sources. *See* United States Commission on Civil Rights, The Challenge Ahead 61-94 (1976); S. Slichter, J. Healy & E. Livernash, The Impact of Collective Bargaining on Management 30-31, 37-38 (1960); H. Hill, Black Labor and The American Legal System, Vol. 1 at 235-47 (1977); W. Gould, Black Workers in White Unions 281-96 (1977); The Potomac Institute, Affirmative Action: The Unrealized Goal 97-115 (1973); F. Marshall & V. Briggs, The Negro and Apprenticeship 34-45 (1967); United States Commission on Civil Rights, Employment 127-38 (1961); 115 Cong. Rec. 40031 (1969) (Order of Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated June 27, 1969, finding exclusionary practices by labor organizations in construction trades and requiring implementation of "Philadelphia Plan"); Contractors Ass'n v. Secretary of Labor, *supra,* 442 F.2d at 164 (noting findings of Assistant Secretary Fletcher in his order dated September 23, 1969, subsequent to public hearings).

[122] Testimony at the trial elaborated on the situation. J.A. 63, 90-93, 98-100. This situation was exacerbated by the Company's insistence on prior craft experience as a requirement for craft work or training and by its use of a "best qualified" standard for hiring production employees prior to 1969. The latter standard may have contributed to the disproportionately low percentage of black employees at Gramercy with pre-1969 seniority. This in turn made it impossible to secure significant numbers of minority craft trainees through selection based strictly on seniority in any reasonable time frame. *See* note 138 below. Although Kaiser utilized the best qualified standard in good faith, this defense would be "insufficient to dispel a prima facie case of systematic exclusion." Alexander v. Louisiana, 405 U.S. 625, 632 (1972), *cited in Teamsters, supra,* 431 U.S. at 342 n.24.

the underlying need for the training program. As Mr. Thomas Bowdle, Kaiser's EEO Director, testified at trial, there "has been ample evidence presented in the last six or eight years that minorities were discriminated [against], in fact, in terms of their ability to get into the building trades occupations." [123] The historical exclusion of minorities from the trade unions has been the subject of litigation and administrative proceedings time and time again.[124] In many of those cases,

[123] J.A. 104. Company witness Dennis English also explained:

> Most of the training for craftsmen over the years has come through the building trades. They have apprenticeship programs, whereby a candidate spends four or five years in an apprenticeship program, and he graduates as a skilled craftsman. Until just recently, blacks did not get into those building trades programs.

J.A. 63. Mr. Bowdle offered similar testimony. J.A. 91, 93.

[124] EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251 (2d Cir. 1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); Associated Gen. Contractors, Inc. v. Altshuler, *supra*; Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Plumbing Indus. Local 24, 364 F. Supp. 808 (D.N.J. 1973); United States v. Local 357, IBEW, 356 F. Supp. 104 (D. Nev. 1973); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969). Administrative proceedings are referred to in Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 681 (7th Cir. 1972) (Dept. of Transportation determination); Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 163-64 (Dept. of Labor hearings and determinations) and Joyce v. McCrane, 320 F. Supp. 1284, 1287 (D.N.J. 1970) (OFCC hearings).

remedial action has been directed repeatedly against the contractors whose work places are the locations where the effects of discrimination must be overcome.[125] Kaiser saw its own situation in a similar light, and considered the new training program

> to be remedial in the sense that, in our opinion, there was obviously discrimination in the past, not ours, per se, but the total sum and substance of education in training to obtain skills, that created the situation that called for a remedy such as the one we derived out of our discussions.[126]

Mr. Justice Frankfurter once observed, "there comes a point where this Court should not be ignorant as judges of what we know as men." [127] To insist, as the Fifth Circuit did here, that no evidence in this case provided a basis for remedial action is to do just that.

2. The Threat Of Legal Compulsion Was Present

Section 703(j) of Title VII specifies that nothing in the Act requires racial balancing. It does not, however, preclude race conscious action required by other federal regulations any more than it limits the scope

[125] EEOC v. Local 638, *supra* at 829-31; United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877-78 (6th Cir. 1974); Associated Gen. Contractors, Inc. v. Altshuler, *supra*, 490 F.2d at 12, 19; Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023, 1027 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Plumbing Indus. Local 24, 364 F. Supp. 808, 831 (D.N.J. 1973); United States v. Plumbers Local 73, 314 F. Supp. 160, 166-67 (S.D. Ind. 1969); Southern Ill. Builders Ass'n v. Ogilvie, *supra*, 471 F.2d at 681, 686; Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 163; Joyce v. McCrane, *supra*, 320 F. Supp. at 1288, 1291.

[126] J.A. 98.

[127] Watts v. Indiana, 338 U.S. 49, 52 (1949).

of equitable remedies under Title VII. *EEOC* v. *AT&T, supra,* 556 F.2d at 174. Kaiser, therefore, could not rely on this section to excuse it from meeting its affirmative action obligations as a federal contractor. Nor would that provision protect the Company from a prima facie case of discrimination under Title VII based on work force statistics.

Kaiser could not help but be aware of its vulnerability to suit at Gramercy. Two neighboring plants were already subject to Title VII proceedings[128] and the minority utilization statistics at Gramercy stood out as a plain invitation to litigants.[129] Its compliance agency had stated that minority representation in the crafts had to be improved, and the threat of sanctions to enforce those recommendations was obvious.[130] Under these circumstances, voluntary action may in reality be a misnomer, for legal compulsion was present as surely as if a suit had been filed or a contract lost.

[128] Kaiser was concerned about Title VII litigation directed at its Chalmette plant, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), and at its Baton Rouge facility. It also had in mind a Title VII suit at the neighboring Crown Zellerbach paper plant. J.A. 83.

[129] J.A. 60, 167. This Court has indicated that statistical evidence of less underutilization of blacks than was disclosed at Gramercy may be sufficient to establish a prima facie case of discrimination. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977).

[130] J.A. 76-77, 82-83, 92-93. In contrast, a voluntary promotion quota was struck down in Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1000-01, 1005-09 (E.D. Mich. 1978), where there was no evidence of underutilization or legal compulsion. Although the department, as a federal grantee, was subject to affirmative action requirements imposed by the Law Enforcement Assistance Administration, the court noted that LEAA had never so much as criticized the department's promotional policies or utilization data. The court, therefore, rejected the department's defense of legal compulsion.

B. The Training Program Adopted By The Company And The Union Provided A Reasonable Remedy

1. There Is A Direct Relationship Between The Remedy And The Problem

In approving race- or sex-conscious measures, this Court and others have generally sought to avoid overly broad remedies. A demonstrable relationship between the nature and scope of the remedy and the problem sought to be cured has usually been required.[131] Here that relationship is apparent.

While it is not possible to calibrate with precision the degree of harm with the scope of a remedy,[132] the analysis in this case is straightforward. The training program was conceived to cure a narrowly defined problem: the absence of qualified minority craft workers. The cause was identified: Minorities were unable to meet the Company's craft experience requirement because of their past exclusion from the trade unions. The consequences of Kaiser's failure to correct the underutilization problem were plain: Title VII litigation and the possible loss of federal contract eligibility.

[131] Regents of the Univ. of Cal. v. Bakke, *supra,* 98 S. Ct. at 2754, and cases cited therein. *See also* International Bhd. of Teamsters v. United States, *supra,* 431 U.S. at 368-72; Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 648-53 (1975); Chance v. Bd. of Examiners, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied sub nom.* Council of Supervisors v. Chance, 431 U.S. 965 (1977).

[132] *See, e.g.,* EEOC v. AT&T, *supra,* 556 F.2d at 174-80; United States v. Allegheny-Ludlum Indus., Inc., *supra,* 517 F.2d at 850, 855, 862-64.

Working from models in the Steel Industry Consent Decree and the aluminum industry,[133] the Company and Union fashioned a remedy that would provide training for craft jobs—a program that was expected to accommodate no more than twenty Gramercy employees at once.[134]

In addition, to be responsive to repeated union demands for more on-the-job craft training, the Company agreed to make all incumbent production employees eligible for the program, provided that half of the openings be reserved for blacks in order to achieve the initial purpose of the undertaking.

In relation to the objective, this new program is clearly within the zone of reasonableness. It should overcome most of the existing underutilization, but it will probably take at least thirty years to do so.[135] That

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[133] Mr. Bowdle testified that the same "approach" which Kaiser adopted in its 1974 agreement with the Steelworkers had been

> adopted in the aluminum industry, the steel industry, the can industry, and I'm sure that if you went out and investigated, you would find that there are industries, smaller, independent, or otherwise, that have arrived at the same conclusions and applied the same principles.

J.A. 94. Mr. English also acknowledged the influence of commitments in the steel industry and the paper industry. J.A. 83.

[134] J.A. 68.

[135] In 1973, there were five black craftsmen at Kaiser out of a total craft population of 273. J.A. 167. In 1974, Kaiser admitted 13 bidders, six white and seven black, into its craft training program. J.A. 166. In 1974, Kaiser also hired at least seven craftsmen off the street, only one of whom was black, thus raising its total craft population to 293. J.A. 167. If we assume that from 1974 forward Kaiser trained 20 new craftsmen every three years, J.A. 68, to make up for attrition; that the craft population of 293 remained constant; that Kaiser added an average of seven black trainees per year; and that no black craftsmen left its employ,

is certainly not an unreasonably *short* period of time.[136] The program separately allocates an appropriate share[137] of opportunities to blacks because without

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it would take 30 years for the black craft population to grow by 101 persons to a total of 114, or 39 percent of the total population of 293. The details of the calculation appear in Exhibit A. Moreover, if any black craftsmen leave Kaiser or if Kaiser continues to hire craftsmen off the street, and only one out of seven, or 14 percent, of those hired is black, as was true in 1974, then it would take longer still to reach an overall black proportion of 39 percent. The testimony of Dennis English stated that off-the-street black craftsmen were not available. J.A. 62-63.

[136] What is a reasonable period of time will vary from case to case, depending on the availability of opportunities resulting from turnover and expansion, the nature of the job qualifications and the competing equities of other employees. Some studies indicate that it may take several decades to achieve racial parity in the job market, even in the absence of overt discrimination. *See, e.g.*, Lieberson & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, Am. J. Soc., Vol. 73, No. 2 (1967). The time required until affirmative action produces the desired results may seem unreasonably long in some cases, but this only emphasizes the need to encourage prompt employer action on a voluntary basis.

The situation is similar to the story President Kennedy used to tell about French Marshall Lyautey, who asked his gardener to plant a tree:

> The Gardener objected that the tree was slow growing and would not reach maturity for a hundred years. The Marshall replied, "In that case, there is no time to lose, plant it this afternoon."

Address in Berkeley at the University of California, March 23, 1962, Public Papers of the Presidents, John F. Kennedy, 1962, 263, 266.

[137] The area work force in Gramercy was 39 percent black. J.A. 60. An allocation of 50 percent of the training opportunities for black *and* female candidates is not even disproportionate in relation to availability of these groups in the local labor market. Certainly, it was reasonable in light of the distance between the level of current utilization (approximately 2 percent) and the goal, and the trainee vacancy rate of only 4 percent of craft jobs in 1974. J.A. 167.

such allocation black progress in the crafts would proceed at a glacial pace.[138] Absent race-specific selections, the program would have lost its value as affirmative action. With such selections, seven black employees obtained places in the new training program which none of them would otherwise have enjoyed.[139]

More could have been achieved for affirmative action in a shorter time if white employees had been wholly foreclosed from eligibility or afforded a smaller share of the opportunities. But such a program would have incensed union members who had pressed for training opportunities for incumbents for years.[140] The Company and the Union were sensitive to the competing interests of white males and sought a viable compromise which would nevertheless eliminate the problem of substantial underutilization of blacks and its consequences. As stated by Kaiser's witness, Mr. Bowdle, at trial, Company and Union personnel designed a program that would, in "our best judgments . . . *least disrupt the system and still achieve the goal,* other than trying to find rationales for not doing it." [141] Measured in relationship to those objectives, the program has been a success.

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[138] Much of the hiring of blacks in production jobs had occurred since 1969. Pet. App. 23a-24a & n.3, 563 F.2d at 231 & n.3; J.A. 60, 81-82. These relatively new employees would have little likelihood of being selected as craft trainees for several years. J.A. 71-72, 87. Thus, even the moderate pace of change anticipated under the Kaiser-Steelworker agreement would be slowed if not interrupted. *See* note 135 *supra.*

[139] J.A. 86-87.

[140] J.A. 73, 85.

[141] J.A. 103 (emphasis added).

2. Due Consideration Was Given To The Interests Of White Workers

In *Bakke,* the university, described as "an isolated segment" of society, was criticized for seeking to redress complex social inequities at the expense of certain racial and ethnic groups. The benign arrogance implicit in the university's judgments results from unilateral decision making in its admissions program. Unlike the university, Kaiser did not act alone in resolving the competing interests and obligations it faced. The participation of the Union in the adoption of the program provided both white and minority employees with representation committed to protecting their interests to the fullest extent feasible. The process worked well, for, like their black counterparts, white production workers at the Gramercy plant obtained craft training opportunities for the first time.[142] The fact that some of the white bidders want the benefits of the process sooner than they will be available under the agreement does not condemn the agreement.

a. Kaiser And The Steelworkers Used Their Best Judgment To Reconcile Competing Interests

Congress years ago designed a national labor policy, since confirmed by the courts, around the belief that employers and unions are in the best position to reconcile competing interests of the employer and employees.[143] Though the result may be to subordinate the

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[142] The initial selections in 1974 included six white males who would not otherwise have been eligible for in-plant training opportunities. J.A. 51, 66.

[143] *See, e.g.,* § 1 of the National Labor Relations Act of 1935, 29 U.S.C. § 151 (1976); § 201 of the Labor Management Relations Act of 1947, 29 U.S.C. § 171 (1976); Emporium Capwell Co. v.

interests of some employees to those of others, the collective bargaining process has been given deference and protection as the fairest and most workable system for assuring a proper accommodation of diverse interests.[144] The union's duty of fair representation provides additional assurance that the balance of competing equities among the employees themselves will not be unfairly distorted.[145]

This Court has held that the "elimination of discrimination and its effects is an appropriate subject of bargaining." *Emporium Capwell, supra,* 420 U.S. at 69. It has also acknowledged that judicial deference

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Western Addition Community Organization, 420 U.S. 50, 62 (1975); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

[144] *See, e.g.,* TWA v. Hardison, 432 U.S. 63, 79 (1977); Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 62, 70, and cases cited therein; Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). *See also* Pellicer v. Bhd. of Ry. & S.S. Clerks, 217 F.2d 205, 206 (5th Cir. 1954), *cert. denied,* 349 U.S. 912 (1955).

[145] Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 64. ***But see*** Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974). The statement in footnote 19 of *Gardner-Denver* that "harmony in interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made . . .", is obviously addressed to situations disfavoring those who are in the minority within the union as well as within their employer's work force. There is far less reason, if any, for suspecting the union's motives when its actions favor minority group members as they allegedly did here. In fact, the collective bargaining process has been likened to the legislative process in this regard. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944). *Cf.* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) and J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

to the joint action of companies and unions in matters that are proper subjects of collective bargaining is generally the appropriate judicial role.[146] Other important federal policies and even individual rights may be lawfully subordinated to the process and results of collective bargaining.[147]

An employee's Title VII rights may not be violated or waived through the collective bargaining process, of course. *TWA* v. *Hardison,* 432 U.S. 63, 79 (1977); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 51 (1974). Certainly, the proposed standard of reasonableness would not preclude white members of the union from asserting their Title VII rights in this litigation any more so than in a Labor Management Relations Act context. In determining whether those rights have been violated, however, some deference is due the collectively bargained agreement whereby the Company and Union reached an accommodation of the Title VII rights and obligations of all the parties and their constituents.

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[146] *See, e.g.,* Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 62, 70; *Huffman, supra,* 345 U.S. at 339-43; Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295-97 (1959).

[147] *See, e.g.,* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691, 710 (1965) (agreement limiting working hours does not violate antitrust laws); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226-27 (1977) (Stewart, J.) (upholding agency shop despite impact on employees' First Amendment rights). *Cf.* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975), where Mr. Justice Powell spoke of the need to reach a "proper accommodation" of national goals favoring competition and collective bargaining.

The Company and the Union have the strongest reasons and responsibilities [148] to resolve the competing interests involved in this case in an equitable manner. To approve judicial nullification of that process in the context of this case would be contrary to national labor policy and, as demonstrated above, devastating to the interests of black workers and to the nation's goal of equal employment opportunity.

b. The Program Did Not Abrogate The Rights Or Expectations Of Incumbents

Two facts about the impact of the 1974 training program on incumbent white production workers are clear: When the Company and Union adopted the training program in 1974, (1) they neither lost nor compromised any preexisting rights or expectations; and (2) for the first time, they gained an opportunity to qualify as craft workers. Before the adoption of the program, the only avenue to craft jobs for such employees would have required them to leave the Gramercy plant and to acquire experience elsewhere. The Respondent on their behalf now complains that their chance to acquire experience on the job will not come soon enough.

The legitimate expectations of employees arising out of seniority rights established under a collective bar-

[148] The union's duty of fair representation is owed to both black and white members. To meet this statutory responsibility a union is obligated to seek the most equitable accommodation of the sometimes competing interests of the two groups. *Cf.* Franks v. Bowman Transp. Co., 424 U.S. 747, 793 n.13 (Powell & Rehnquist, JJ., concurring in part); Ford Motor Co. v. Huffman, *supra*, 345 U.S. at 337-39. Certainly, there is no reason to expect that it will be unfair to those who are the majority of its membership. *See* note 145 *supra*.

gaining agreement have been shown particular solicitude by the courts.[149] Although even these expectations may be deferred or put aside for lawful purposes,[150] some courts which have upheld hiring "quotas" have struck down promotion "quotas" in deference to seniority or other interests.[151] Whether or not such an analysis is correct under Title VII,[152] it treats the incumbent employee differently than the applicant at the gate. Unlike the incumbent, the new job applicant has merely a hope, not an expectation of employment. While court-approved hiring quotas have often reserved a portion of new vacancies for nonminority candidates to avoid total foreclosure of opportunities for white males, this has generally been done in the exercise of the equitable powers of the court, not out

[149] *See, e.g.*, TWA v. Hardison, 432 U.S. 63, 79-85 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 343-57, 372-76 (1977); Franks v. Bowman Transp. Co., *supra*, 424 U.S. at 766-67; EEOC v. AT&T, 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

[150] *See, e.g.*, International Bhd. of Teamsters v. United States, *supra*, 431 U.S. at 372-76; Franks v. Bowman Transp. Co., *supra*, 778, and cases cited therein; EEOC v. AT&T, *supra* at 177 & n.6, *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978), and cases cited therein.

[151] *See, e.g.*, Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 429-30 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340-41 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975). *See also* White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091-92 (4th Cir. 1977); Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1010-12 (E.D. Mich. 1978).

[152] *See* EEOC v. AT&T, *supra*, 556 F.2d at 177, *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

of deference to any individual's expectations of a job.[153]

The legitimate expectations of Kaiser production workers of securing craft jobs at the Gramercy plant could have been no greater than those of an inexperienced applicant at the gate. They had nothing more to lose from the adoption of the new training program in 1974 than they did from the implementation of the one-to-one black-white hiring quota at Gramercy in 1969. On the contrary, they stood only to gain.

C. Summary

Under the circumstances in this case, Kaiser and the Union acted well within the zone of reasonableness of affirmative action in adopting the challenged training program. Perhaps no one of the factors described above is indispensable, nor is any one sufficient to justify race conscious action by employers and unions. But under the conditions that existed at the Gramercy facility in 1974, in light of the law as it is and was understood, the Company and Union did not give black employees too much too soon.

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[153] *See, e.g.*, United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir.), *cert. denied sub nom.* Arado v. United States, 434 U.S. 875 (1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1017-18 (3d Cir. 1976); Crockett v. Green, 534 F.2d 715, 718 (7th Cir. 1976); NAACP v. Allen, 493 F.2d 614, 617, 621 (5th Cir. 1974); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 374-75 (3d Cir. 1974); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398-99 (2d Cir. 1973).

CONCLUSION

In his opinion in the *Bakke* case, Mr. Justice Blackmun wrote:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where [race conscious] action . . . is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

98 S. Ct. at 2806.

These observations could well have been made in a Title VII case for they reflect the fact that race conscious means must often now be used to achieve the ultimate goal of a work place that is free of discrimination. Although care should be taken in adopting or approving a race conscious remedy, employers and unions should not be disabled from taking such action voluntarily. Where, as here, the action was taken under compelling circumstances and safeguarded, indeed promoted, the interests of nonminorities to the fullest extent feasible, it should be upheld with confidence

that it is a "blend of what is necessary, what is fair, and what is workable." [154]

Respectfully submitted,

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[154] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (Burger, C.J.) (footnote omitted).

EXHIBIT

EXHIBIT A

Year	New Craft Trainees [1]	New Black Craft Trainees [2]	Total Black Craftsmen [3]
1974	13	7	13
1975	0	0	13
1976	7	3	16
1977	8	4	20
1978	5	3	23
1979	7	3	26
1980	8	4	30
1981	5	3	33
1982	7	3	36
1983	8	4	40
1984	5	3	43
1985	7	3	46
1986	8	4	50
1987	5	3	53
1988	7	3	56
1989	8	4	60
1990	5	3	63
1991	7	3	66
1992	8	4	70
1993	5	3	73
1994	7	3	76
1995	8	4	80

[1] Based on the maximum estimate of 20 trainees in a three-year period. J.A. 68. The Exhibit also assumes that Kaiser would only select eight trainees in 1977 to replace its graduating group of 13. Such a procedure would permit Kaiser to select five more trainees in 1978 to fill the three-year class to 20, and thus assure a system whereby some trainees might be chosen every year.

[2] Chosen on a 50-50 black-white ratio. If an uneven number of trainees enter the program in a given year, an extra black is selected one year and an extra white is selected on the next uneven year.

[3] Including six black journeymen as of 1974-1975. J.A. 71.

EXHIBIT A Continued

1996	5	3	83
1997	7	3	86
1998	8	4	90
1999	5	3	93
2000	7	3	96
2001	8	4	100
2002	5	3	103
2003	7	3	106
2004	8	4	110
2005	5	3	113
2006	7	3	116

Supreme Court, U.S.
FILED
JAN 30 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435 and 78-436

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

BRIAN F. WEBER, ET AL.

KAISER ALUMINUM & CHEMICAL CORPORATION,
PETITIONER

v.

BRIAN F. WEBER, ET AL.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Franks v. *Bowman Transportation Co.*, 424 U.S. 747 .....24, 26, 37, 51

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Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *et seq.*:

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41 C.F.R. Part 60-10 60
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Miscellaneous:

Comments, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. of Chi. L. Rev. 723 (1972) 31, 64
Committee on Government Contracts, *Patterns for Progress* (Final Report) (1960) 57, 62
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110 Cong. Rec. (1964):

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H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 23, 63
F. Marshall, *The Negro Worker* (1967) 58
F. Marshall and V. Briggs, Jr., *The Negro and Apprenticeship* (1967) 58
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, ET AL.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

BRIAN F. WEBER, ET AL.

No. 78-436

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a)[1] is reported at 563 F.2d 216. The order of the court of appeals denying rehearing (Pet. App. 57a-58a) is reported at 571 F.2d 337. The opinion of the district court (Pet. App. 59a-79a) is reported at 415 F. Supp. 761.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on November 17, 1977. Petitions for rehearing were denied on April 17, 1978 (Pet. App. 57a-58a). On July 7, 1978, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including September 14, 1978. The petitions in Nos. 77-432, 77-435, and 77-436 were filed on September 14, 1978, and granted on December 11, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of an admission or proof of past discrimination, an employer and a union may adopt a training program based in part upon a racial criterion to remedy apparent discrimination in hiring for skilled craft jobs at one of the employer's plants.

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[1] "Pet. App." refers to the appendix to the petition in No. 78-436.

STATUTORY PROVISIONS INVOLVED

Several pertinent provisions of Title VII of the Civil Rights Act of 1964 are set forth in the Appendix to the Petition for a Writ of Certiorari in No. 78-435 (Pet. App. 66a-68a).

In addition, Section 706(g) of Title VII, Pub. L. No. 88-352, 78 Stat. 261, as amended, 42 U.S.C. 2000e-5(g), provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate. * * * No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a).

Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), reprinted in 42 U.S.C. 2000e at 1232, is set forth in the Appendix to the Petition for a

Writ of Certiorari in No. 78-435 (Pet. App. 69a-83a).

STATEMENT

1. Kaiser Aluminum & Chemical Corporation operates a plant in Gramercy, Louisiana, located along the Mississippi River about halfway between New Orleans and Baton Rouge. The plant, which has been in operation since 1958, draws employees from the neighboring two parishes of St. James and St. John the Baptist (Pet. App. 62a; A. 60, 78).

In 1969, although the local population was approximately 46 percent black and the local labor force about 39 percent black, only about 10 percent of the employees at the Gramercy plant were black (Pet. App. 35a; A. 60, 78-79). In that year, at the urging of the Office of Federal Contract Compliance,[2] Kaiser began filling approximately half the vacancies in the unskilled, non-craft jobs at the plant with minority applicants (A. 78-79, 81-82, 87). As a result of this policy, the percentage of minority employees at the plant increased by about one percent per year between 1969 and 1974, so that by December 1973, approximately 15 percent of the plant's employees were black (A. 59-60, 87).

[2] The Office of Federal Contract Compliance, subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an office within the Department of Labor. It is responsible for ensuring compliance by government contractors with the equal employment opportunity responsibilities established by Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), and by Executive Order 12086, 43 Fed. Reg. 46501 (1978).

In the skilled craft jobs at the plant, the percentage of minority employees was even lower than in the plant as a whole. By the end of 1973, there were only five black employees among the 273 skilled craft workers at the plant—less than two percent (A. 62, 167). Kaiser attributed the disparity between the percentage of blacks in the local labor force and the percentage of black employees holding skilled craft jobs at the Gramercy plant to the lack of training opportunities for blacks, caused in large part by discrimination in the building trades and related industries (A. 63, 90, 93, 103-104).

Prior to 1974, Kaiser had filled almost all the craft positions at the Gramercy plant by hiring craftsmen from outside the plant who met the company's experience and qualification requirements (A. 71, 77, 125). These requirements initially included at least five years of previous industrial experience in the craft (A. 43, 70). Because blacks had not been permitted to participate in substantial numbers in union and employer-operated craft training and apprenticeship programs, there were not many black craftsmen available who could meet Kaiser's five-year experience requirement for the craft jobs (A. 43). Although that requirement was subsequently reduced to three years of prior experience (A. 43, 70), and although the company made efforts to recruit qualified black craftsmen who met that experience requirement (A. 62-63), by the end of 1973 only three of the

craft jobs in the plant were held by blacks who had met the company's experience and qualification requirements (Pet. App. 17a & n.13).

Between 1964 and 1971, Kaiser offered two on-the-job training programs to train unskilled plant employees for the plant's skilled jobs. Both programs, however, were quite limited in the numbers of trainees taken, and both required at least some previous experience in the craft for which the training was offered. The first program, which began in 1964, offered training in the "Carpenter-Painter" craft category. Employees with a minimum of one year's experience in that craft were permitted to bid for the program. Openings in the program were filled on the basis of seniority. A total of 11 employees entered this craft line during the period that the training program was in effect. Only two of the 11 were black (A. 126). The second program, which began in 1968, offered employees on-the-job training in the craft category of "General Repairman." Employees with three years' prior experience in the craft were eligible for this program, for which the qualified applicants were selected in order of their seniority at the plant. Seventeen trainees entered this program during the period it was in effect. All were white (A. 126).

In late 1973, in anticipation of the upcoming collective bargaining negotiations with the United Steelworkers of America, the certified representative of most of the production and maintenance employees at Kaiser's plants, Kaiser officials met with Steelworkers

representatives to discuss the problem of the low number of minority employees in craft positions, not only at the Gramercy plant but in Kaiser's plants throughout the country. As one Kaiser official characterized the discussions, "[t]here was certainly a concert of opinion that there was a problem, and one that had to be solved, so that [there] were preparatory discussions, prior to the negotiations, that there had to be some solution arrived at to change the situation" (A. 92). A joint company-union committee was established to "resolve possible inconsistencies" between Kaiser's hiring practices and "Government and judicial decisions" (A. 139).

In early 1974, Kaiser signed a nationwide collective bargaining agreement with the Steelworkers. The company and union issued a joint "memorandum of understanding" at that time, in which they stated that after reviewing the minority representation in the company's skilled craft jobs, they had determined that "notwithstanding the efforts made by the Company and the Union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246," the participation of minority employees in skilled craft positions at Gramercy and other Kaiser plants "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions" (A. 144-145). To achieve this goal, the 1974 collective bargaining agreement provided that at least half the employees placed in training programs for craft jobs in the designated plants should be minority

group members or women unless not enough qualified minority or women applicants were available at the time. That selection ratio would be maintained at each plant, according to the agreement, until the minority representation in the craft jobs was equivalent to the minority representation in the local labor market (Pet. App. 62a-64a).[3] Similar minority-oriented training programs were established throughout the aluminum industry as well as in the can industry (A. 61, 94). These programs mirrored a provision in the 1974 nationwide steel industry consent decree, to which the Steelworkers union was a party. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 880 n.87 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

2. Respondent Weber is a white employee at Kaiser's Gramercy plant. In April 1974 the Gramercy plant announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs, in accordance with the terms of the 1974 collective bargaining agreement.[4] Bidding for the positions was open to all employees in the plant, with eligibility to be determined on the basis of plant seniority. To implement the 50 percent

[3] A goal of five percent female representation was set for each craft family in each of the plants included within the program (A. 145).

[4] Five of the positions were for a training program for the "General Repairman" craft class, two were for the "Electrician" craft class, and two were for the "Instrument Repairman" craft class (A. 166).

minority participation goal, however, black and white applicants were selected on the basis of their relative seniority within their racial group (Pet. App. 2a). Thus, the five most senior black applicants and the four most senior white applicants were selected for the nine positions in the April 1974 programs.[5] Weber applied for all three programs offered in April but was not selected (A. 46-47). Two of the black applicants who were selected had less plant seniority than Weber (A. 32-33, 156-161).

For the year 1974, the company offered a total of 13 training positions for skilled craft jobs.[6] Selections were made on an alternating basis between the most senior black and white employees bidding, so that by the end of the year the company had selected seven black employees and six white employees for the 13 positions. In each instance, successful black bidders were junior in plant seniority to some unsuccessful white bidders (Pet. App. 2a, 63a). A Kaiser official

[5] There were two women employed in unskilled jobs at Gramercy at that time. Although under the memorandum of understanding women were entitled to compete for the positions reserved for minority and women employees, neither of the women employees bid for the 1974 programs.

[6] In addition to the April programs, the company offered three more training programs in 1974 with a total of four positions available. Two white and two black employees were selected for the programs, which were for "Air Conditioning Repairman" (one position), "Carpenter-Painter" (two positions), and "Insulator" (one position). Weber sought to bid for the insulator trainee position, but he was not selected because that job was reserved for the most senior qualified black employee (A. 46).

stated that if selections had been made strictly by seniority, "there would be very few blacks that would get into any of the crafts for quite a while" (A. 72). During the same year, the company hired 22 craftsmen from outside the plant. All but one of those employees were white (A. 65).

3. Weber filed a complaint in the District Court for the Eastern District of Louisiana, alleging that the use of a racial criterion to fill the craft training vacancies violated Sections 703(a) and 703(d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-2(d). The district court certified a plaintiff class consisting of all non-minority employees at Gramercy who had applied for or were eligible to apply for the on-the-job training programs (Pet. App. 61a; A. 34).

The two Kaiser officials who testified at trial[7] denied that Kaiser had discriminated in hiring, but they stated that the company was aware of its vulnerability to private or governmental lawsuits under Title VII and to coercive sanctions under Executive Order 11246 (A. 62, 77, 92-93). Kaiser and other aluminum companies had been defendants in Title VII litigation relating to plants similar to the Gramercy plant,[8] and Kaiser and the Steelwork-

[7] Four witnesses testified at the one-day trial: Weber, the two Kaiser officials, and another white employee who had not been selected for any of the training programs. In addition, a short factual stipulation and accompanying exhibits were introduced into evidence. The union did not call any witnesses.

[8] Two of these lawsuits alleged discrimination at Kaiser's other plants in Louisiana (see pages 46-47, *infra*).

ers were aware of the government's industry-wide lawsuit against the steel industry, which had led to a consent decree costing the steel companies millions of dollars in back pay awards (A. 83, 97). See *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*.

Kaiser decided to take voluntary affirmative action, according to one of the company witnesses, because "we looked at our problem, which was that we had no blacks in the crafts, to speak of * * * and we realized that if we did not do something on our own, then the Government was going to do it for us * * * [and] whatever their remedy is * * * it's one heck of a lot worse than something we can work out for ourselves" (A. 83). Another company witness testified that Kaiser officials had decided "that we should do those things that are necessary, without having to have it forced down our throat or require us to go into court to comply with the laws of the land" (A. 97). The witness added that during reviews of Kaiser's compliance with the affirmative action obligations of Executive Order 11246, the OFCCP, through two of its compliance agencies, had put pressure on Kaiser to increase the number of minority employees in craft jobs. He stated, "I don't think that I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing" (A. 93). The Steelworkers favored voluntary

affirmative action, according to the company witnesses, and the union particularly favored the on-the-job training programs because they offered incumbent employees of both races a new means of access to the skilled craft jobs (A. 64, 73, 85, 97).

The district court held that assignment by race to the on-the-job training programs at the Gramercy plant violated Title VII. In the court's view, "quota systems" could be imposed as a form of relief only by the courts and then "only in these limited cases where necessary to cure the ill effects of past discrimination" (Pet. App. 73a). The court found that Kaiser's decision to bargain for on-the-job training programs was "prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC) * * *" (Pet. App. 65a). The primary motivations for instituting the programs, the court found, were "satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees * * *" (*ibid.*). Yet the court concluded that because the black employees selected for on-the-job training programs at the Gramercy plant "had never themselves been the subject of any unlawful discrimination during hiring," the kind of "affirmative action quota system" exemplified by the race-conscious training programs would have been an inappropriate remedy for a court to order. Thus,

Kaiser's practice of selecting trainees by race was unlawful, the court held, even if Title VII permits an employer to institute a race-conscious program in those circumstances in which a court could properly order a race-conscious remedy (Pet. App. 77a). The court granted an injunction barring Kaiser and the Steelworkers "from denying plantiffs, Brian F. Weber and all other members of the class access to on-the-job training programs on the basis of race" (Pet. App. 81a).

4. The court of appeals affirmed, one judge dissenting.[9] It held that using race as a criterion for selecting trainees in the Gramercy training programs violated Sections 703(a) and 703(d) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-2(d). The court of appeals rejected the district court's conclusion that only courts could institute race-conscious programs to remedy prior discrimination (Pet. App. 15a-16a), but it agreed with the district court that on the facts of this case, the use of a racial criterion in the selection of trainees violated Title VII (Pet. App. 20a). The court noted that the district court found that Kaiser "has not been guilty of any discriminatory hiring or promotion at its Gramercy plant" (Pet. App. 17a). In the absence of prior discrimination, the court held, "a racial quota loses its character as

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[9] The United States and the Equal Employment Opportunity Commission did not participate in the district court, but filed a brief as amici curiae in the court of appeals. The United States and the Equal Employment Opportunity Commission then intervened in the case for purposes of filing a petition for rehearing and for any further proceedings in the case. See 42 U.S.C. 2000e-5(f)(1).

an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII" (*id.* at 18a; emphasis in original). Title VII, the court stated, "outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination" (Pet. App. 18a-19a). Yet because, in the court's view, a racial preference is permissible only if it is designed "to restore employees to their rightful places within a particular employment scheme" (*id.* at 20a), the court held that the preferential training programs could not be used in this case, where there was no proof that Kaiser had discriminated against the particular individuals benefitted by the racial preference (*id.* at 31a).

The court of appeals also rejected the contention that the Executive Order supports the legality of the Gramercy training programs. The Executive Order, the court stated, cannot sanction affirmative action programs that would otherwise be contrary to Title VII (Pet. App. 24a). If the Executive Order purports to require a racial quota for admission to on-the-job training by Kaiser, the Executive Order must give way to the congressional prohibition contained in Title VII, the court held, at least in the absence of any finding of prior discrimination in hiring or promotion by Kaiser (*id.* at 25a).

In dissent, Judge Wisdom offered three justifications for Kaiser's program. First, he pointed out that to condition affirmative action on proof of past

discrimination would discourage voluntary compliance with the equal employment opportunity goals of Title VII (Pet. App. 31a-32a). Employers and unions, he stated, should be permitted to institute reasonable voluntary remedies for arguable violations of Title VII. Judge Wisdom pointed to the low level of minority participation in the general work force at the Gramercy plant and particularly in the skilled craft positions, as well as the exclusionary effect of the company's practice of requiring five years of prior experience and training as a prerequisite for the craft positions (*id.* at 35a-37a). These factors, he concluded, were sufficient to put Kaiser and the Steelworkers at risk of being found to have violated Title VII; they should therefore be entitled to devise a reasonable remedy, such as the Gramercy training programs, for these arguable violations of the Act (*id.* at 37a-42a). Second, Judge Wisdom stated that employers and unions should be permitted voluntarily to take steps to remedy the severe and recent discrimination against blacks in employment in the skilled crafts generally (*id.* at 43a-47a). Third, he concluded that the Gramercy training programs might be justified as part of Kaiser's effort to comply with the affirmative action requirements of Executive Order 11246 (*id.* at 48a-53a). If it were necessary to reach this question, Judge Wisdom stated, a remand would be necessary to determine whether the training programs are consistent with the Executive Order and, if so, whether the federal

authorization of such action raises any constitutional questions.[10]

SUMMARY OF ARGUMENT

Title VII was enacted to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971). While the statute protects both whites and non-whites from employment discrimination, it does not prohibit employers from taking account of race in making employment decisions. Because Title VII outlaws employment practices that have a discriminatory effect as well as those that are the product of discriminatory intent, the statute requires that employers be conscious of the racial impact of their employment practices. And even where race-conscious action is not required by the statute, it is permitted if it serves to remedy the effects of prior discriminatory conduct.

This much is undisputed. Yet while the court of appeals acknowledged that an employer can lawfully take race-conscious action to remedy its prior discrimination, the court held that such action is permissible only in very limited circumstances: to justify the race-conscious action, according to the court of appeals, the employer must prove that it engaged

[10] Judge Wisdom did not disagree with the majority that any conflict between the Executive Order and Title VII should be resolved in favor of Title VII. In this case, however, he found no conflict between the two (Pet. App. 48a).

in discrimination, and its remedial action must be limited to benefiting the particular victims of its discriminatory conduct. In our view, this standard is too narrow. Although an employee makes a prima facie showing of a violation of Section 703(a) of the Act by proving that the employer took action that disadvantaged him and was based on a racial criterion, that prima facie showing is rebutted if the employer can show that it had a reasonable basis for believing that race-conscious action was necessary to bring it into compliance with Title VII or to remedy past violations of the Act.

Kaiser had ample cause for concern that it might be held liable for discriminating against blacks in the craft positions at its Gramercy plant. The representation of blacks among the skilled craft workers at the plant was far below their representation in the local labor force, and it was well below their representation among craft workers in the local area. Moreover, Kaiser had long required substantial previous industrial craft experience as a prerequisite for entry into craft jobs at the Gramercy plant. That requirement, as Kaiser officials recognized, had an adverse impact on blacks. Unless it were found to meet the stringent test for job-relatedness under Title VII, that requirement, in conjunction with the huge disparity between the proportion of blacks in the skilled craft positions at the Gramercy plant and in the general labor force, would render Kaiser highly vulnerable to a successful Title VII suit by minority employees or applicants for employment.

In response to concerns about the underrepresentation of blacks in the craft positions at Gramercy, Kaiser and the Steelworkers agreed to take steps to remedy the situation. The action they decided to take—instituting craft training programs for unskilled employees—was an appropriate response to the problem. The programs benefited all incumbent employees, both white and black, by offering new opportunities for entry into the craft categories. At the same time, by providing for selection of minorities into the training program on a one-for-one basis, the program ensured that minorities would gain access to craft jobs and that the training programs would not perpetuate the effects of previous hiring practices at the Gramercy plant. Indeed, a training program limited to incumbent employees would otherwise have a built-in racial bias, due to the substantially smaller proportion of minority employees—and especially senior employees—in the plant compared to that in the local labor force.

The remedy selected by Kaiser and the Steelworkers thus was an appropriate one under the circumtances. A court could have imposed such a remedy if, after litigation, it had found that Kaiser had discriminated against blacks in selecting employees for craft positions. The legislative history of Title VII establishes that numerical race-conscious measures, such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And, even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation. Moreover, as the legislative history of Title VII further shows, the kind of measures taken here were understood to be consistent with the affirmative action requirements of Executive Order 11246, and not to be prohibited by Title VII.

In this case, the remedial measures were instituted voluntarily, without litigation and without formal administrative sanctions under the Executive Order. Yet the absence of formal proceedings does not render unlawful what could lawfully have been imposed either administratively or by a court. Voluntary compliance is a central theme of Title VII, and once it is determined that particular race-conscious action is appropriately remedial, that action does not violate the non-discrimination principle of Title VII, whether it is contained in a collective bargaining agreement or in the order of a court. Nor would the purposes of the Act be served by requiring an employer to admit and prove its own violations of the law in order to justify remedial action of this nature. Such a requirement would plainly discourage voluntary compliance. Instead, it would leave an employer in the awkward posture of having to await litigation charging discrimination against minorities while being prohibited from taking steps that would help remedy the effects of its apparent past acts of discrimination. Title VII does not compel such a result. The voluntary action taken by Kaiser and the Steelworkers in this case is consistent with, and not prohibited by, Title VII.

ARGUMENT

THE GRAMERCY TRAINING PROGRAMS ARE A PERMISSIBLE FORM OF VOLUNTARY AFFIRMATIVE ACTION UNDER TITLE VII

In 1973 Kaiser and the Steelworkers found themselves faced with a difficult dilemma. They recognized that minorities were dramatically underrepresented in the skilled craft jobs at the Gramercy plant and elsewhere. They could have elected to take no action, but they realized that inaction could well result in private suits and possible sanctions by the OFCCP. Instead, they chose what appeared to be the preferable course: to take measured steps to increase minority representation in the plant's craft categories, even though that course would necessarily involve the company in race-conscious employment practices.

Kaiser and the Steelworkers sought to devise a scheme that would help cure the problem of the underrepresentation of minorities in the skilled craft jobs and at the same time benefit incumbent employees—white as well as black. Accordingly, they determined to offer new on-the-job training programs for skilled craft positions that would be open only to employees within the plant. But because of past hiring practices, the plant population was disproportionately white in comparison with the general work force in the area—and especially so among those with greater employment seniority. Therefore, in order to ensure that minority participation in the training programs would be significant, they had to use race

as one criterion for selection to the programs. Otherwise, the use of a training program limited to in-plant applicants would itself arguably have been an instrument of racial discrimination. It was the decision to use race as a selection criterion that led to the suit by respondent Weber and a class of white employees who sought admission to the training programs offered at the Gramercy plant.

By showing that a racial classification was used for selection, respondent made a prima facie showing of a violation of Sections 703(a) and 703(d) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-2(d), under this Court's decision in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976). Our submission is that the complainants' prima facie case was rebutted, because the use that is made of race as a criterion for selecting participants in the Gramercy training programs does not constitute discrimination against Kaiser's white employees and does not improperly limit, segregate, or classify them, in violation of the statutory standards. Instead, a race-conscious selection device is properly used here for remedial purposes—as a means of voluntarily eliminating the effects of prior exclusionary practices.

Upon a finding of employment discrimination, a court may order race-conscious relief; indeed, such relief is often necessary to overcome the effects of the unlawful discrimination. See *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), slip op. 32 (opinion of Powell, J.); *id* at 18-19 n.17, 30-31 & n.28 (opinion of Brennan, White,

Marshall, and Blackmun, JJ.). Yet a race-conscious remedy is not lawful simply because a court has imposed it: it is lawful because it is remedial and restores employment conditions, to the greatest extent possible, to what would have existed absent discrimination. As we shall show, Title VII does not prohibit employers or unions from voluntarily taking remedial measures that courts could order upon a finding of discrimination. Thus, where a particular program is appropriately tailored to remedy apparent employment discrimination and a court could order the program as a remedy for proven employment discrimination, an employer is free to adopt the program voluntarily. This is so even if the program uses a racial criterion which, but for its justification as a remedy, would violate the Act. In this way, the broad prohibitions of Title VII are properly reconciled with its remedial purposes and its emphasis on encouraging voluntary compliance.

A. Title VII Permits, and Often Requires Employers to Take Race-Conscious Action

Not all race-conscious action taken by an employer constitutes racial discrimination or serves impermissibly to "limit, segregate, or classify" employees by race. In some respects, Title VII actually requires the employer to take account of race or even to treat its employees differently on the basis of their race. The required race consciousness is a product of the statute's reach, which includes not only intentional discrimination, but facially neutral conduct that has a discriminatory effect.

Title VII was founded upon legislative determinations that racial minorities were subjected to pervasive and systematic employment discrimination. H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963); H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962). See *Regents of the University of California* v. *Bakke*, *supra*, slip op. 39-40 n.44 (opinion of Powell, J.). Congress had before it "overwhelming" evidence of discrimination in employment, H.R. Rep. No. 914, *supra*, part 2, at 26. Some progress toward eliminating discrimination had been made through state fair employment legislation and through enforcement of federal Executive Orders in the contract compliance area, *id.* at 28-29. Congressional study revealed, however, that "the incidence and depth of inequality remain widespread [and] [d]iscrimination continues to exist in all parts of the country" (*id.* at 29).

Faced with such entrenched patterns of discrimination, Congress legislated broadly. It decreed that no person, black or white, would be discriminated against in employment because of his race. But it was clear that indifference to racial considerations could perpetuate prior discriminatory patterns and their effects. Therefore, Congress held employers and unions accountable not only for intentional discrimination, but also for employment practices having a discriminatory effect.[11] As this Court observed in

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[11] Where Congress, under Title VII, intended not to prohibit practices having disproportionate racial effects, it provided specific statutory exceptions. See, *e.g.*, Section 703(h), 42 U.S.C. 2000e-2(h) (bona fide seniority system); Section 712, 42 U.S.C. 2000e-11 (veterans' benefits).

Griggs v. *Duke Power Co., supra,* 401 U.S. at 429-430, Congress's objective in enacting Title VII was "to achieve equality of employment opportunity and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, under the Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

Because Title VII prohibits employment practices that have a racially disproportionate effect, except where they are justified on grounds of business necessity,[12] the statute necessarily requires employers to be conscious of the racial impact of their employment practices. *Griggs* held that Title VII prohibits the use of employment tests that have a substantial disparate impact on minority applicants or employees, unless the employer proves that the tests are job related. And *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), held that in validating an employment test as job related, employers could be required to counteract its racially disparate effects by resorting to racial criteria. In some circumstances, the Court held, they could be required to undertake "differential validation" of their employment tests; *i.e.,* setting

[12] See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 348-350 (1977); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763 (1976); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431.

one passing score for blacks and another for whites, so that the test would predict success on the job equally well for both racial groups. 422 U.S. at 435. Moreover, even if a selection device is properly validated, it cannot be used if there is an alternative practice available that equally serves business needs but has a lesser exclusionary effect on minorities. *Id.* at 425.

Since compliance with Title VII often requires consideration of race, it cannot be said that the use of racial classifications necessarily violates the Act. By the very process of determining the racial effects of an employment practice, or of differentially validating that practice, or of replacing that practice with another less detrimental to minorities, an employer must consider the race of his employees and applicants.[13] For this reason, "it is clear that employers, to ensure equal employment opportunity, may have to adopt race-conscious hiring practices." *Regents of*

[13] In this respect, Title VII is similar to the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. Like Title VII, the Voting Rights Act protects all individuals from discrimination "on account of race or color." 42 U.S.C. 1973. In order to combat massive discrimination against minority voters, Congress prohibited governmental entities covered by Section 4 of the Act, 42 U.S.C. 1973b, from changing their voting procedures in a manner that would have the effect of discriminating against minorities. 42 U.S.C. 1973c. Compliance with the Act thus "often necessitate[s] the use of racial considerations in drawing district lines," *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144, 159 (1977) (plurality opinion); and "specific numerical quotas in establishing a certain number of black majority districts" may be necessary and are lawful. *Id.* at 162.

the University of California v. *Bakke*, *supra*, slip op. 40 n.37 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

B. Devising Remedies for Discrimination May Require Consideration of Race

Race-conscious measures may be necessary not only to comply prospectively with the Act, but also to remedy the effects of unlawful discrimination in the past. Thus, in *Franks* v. *Bowman Transportation Co.*, *supra*, this Court held that seniority credits could be awarded on a racial basis in class action cases, and in *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-362, the Court applied that principle to "pattern or practice" suits. In addition, appropriately tailored class-based numerical relief has been upheld in all eight circuits that have considered the matter, where such relief is necessary to rectify the effects of past exclusionary practices.[14] See *Regents of the University of Cali-*

[14] See, *e.g.*, *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Patterson* v. *Newspaper Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975); *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), cert. denied, Nos. 77-241, 77-242 and 77-243 (July 3, 1978); *N.A.A.C.P.* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); *United States* v. *Electrical Workers, Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1974); *United States* v. *City of Chicago*,

fornia v. *Bakke*, *supra*, slip op. 32 (opinion of Powell, J.); *id.* at 30-31 & n.28 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The authority to grant race-conscious relief, including numerical relief, if necessary, is found in Section 706(g) of the Act. That Section provides that upon finding a violation of Title VII, a court may order "such affirmative action as may be appropriate," including awards of back pay, orders to reinstate or hire employees, and "any other equitable relief as the court deems appropriate." Numerical remedies, in appropriate cases, may be essential to overcome settled patterns of discrimination. For example, by insuring a degree of minority representation in a work force, a numerical remedy "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." *N.A.A.C.P.* v. *Allen*, 493 F.2d 614, 621 (5th Cir. 1974). Moreover, minority workers are often reluctant to apply for jobs with employers who have excluded members of their race, "absent some positive assurance that if qualified they will in fact be hired on a more than token basis." *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (en

549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977); *Crockett* v. *Green*, 534 F.2d 715 (7th Cir. 1976); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 377 (8th Cir. 1973); *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

banc), cert. denied, 406 U.S. 950 (1972). See also *Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974). Integration, like segregation, tends to perpetuate itself—by word-of-mouth recruitment, by breaking down the stereotypes of inferiority that caused the discrimination, and by creating countervailing forces of nondiscrimination, such as the duty of unions to represent their members fairly.

1. *The Legislative History of the 1964 Act.*

When it enacted Title VII, Congress gave little indication of the kind of remedies it contemplated that courts would order in Title VII suits. Section 706(g) was modeled on the remedial section of the National Labor Relations Act, Section 10(c), 29 U.S.C. 160(c). See *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419. And that provision, as this Court has noted, was intentionally left open-ended:

> [I]n the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.

Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941). In *Phelps Dodge*, the Court made it clear that Section 10(c) was not intended to restrict the remedial powers of the Board

"within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Id.* at 188. Because the National Labor Relations Act, like Title VII, was not confined to the "correction of private injuries," *id.* at 193, the Court held that the remedies granted by the Board should be designed to serve the public purposes of the Act as well as the private purposes of restorative justice.

To be sure, there was considerable concern that the Act would be construed to require the use of quota systems to establish and maintain racial balance in employers' work forces. See, *e.g.*, 110 Cong. Rec. 5877-5878 (1964) (remarks of Sen. Byrd); *id.* at 7774, 7778 (remarks of Sen. Tower). The sponsors of the bill repeatedly assured its opponents that this was not the intent and would not be the effect of the statute. See *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel); *id.* at 7243 (remarks of Sen. Case). But these assurances did not suggest restrictions on remedies that could be ordered after a finding of discrimination. Instead, they made it clear that the statute would not impose a duty on employers to establish racially balanced work forces and that it would not require or even permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act. See *id.* at 7214 (Interpretative Memorandum of Sens. Clark and Case) (court cannot order remedy in the absence of discrimination prohibited by Title VII); *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 14465

(Bipartisan Newsletter No. 28) (neither a court nor the Commission can order quota or other remedies in the absence of discrimination of the kind prohibited by Title VII).

The nature of the concerns about the reach of the statute is made clear by two provisions incorporated into the final version of Title VII. On the eve of passage, Senators Humphrey and Dirksen introduced a substitute for the bill that had been under debate. See Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431, 447-457 (1966). The substitute bill, which ultimately became Title VII, added amendments to allay the fears that the statute would require quota hiring and that it would restrict management prerogatives on a broad front. The amendment that became Section 703(j) of the Act stated that Title VII would not require employers to engage in preferential hiring merely to attain racial balance,[15] and the amendment that became the last sentence of Section 706(g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act. These provisions did not in any way restrict the scope of the remedies that could be ordered for the kinds of discrimination prohibited by the Act. Instead, the adaptation of remedies was left to the courts and agencies charged with enforcing the statute.

[15] Section 703(j) provides that an employer is not required by Title VII "to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by [the] employer." 42 U.S.C. 2000e-2(j). That provision, however, is not a restriction on the use of racial classifications "as a tool for achieving the objective of remedying past discrimination." See *Regents of the University of California* v. *Bakke, supra*, slip op. 18 n.17 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *id.* at 30 n.28; *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 340 n.20, 374 n.61; *Carter* v. *Gallagher, supra*, 452 F.2d at 329; *United States* v. *Ironworkers, Local 86, supra*, 443 F.2d at 552-554; *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047, 1053-1054 (5th Cir. 1969).

The language of Section 703(j) tracks those provisions of Title IV of the same law that prohibit the assignment of school students "to overcome racial imbalance." 42 U.S.C. 2000c(b), and 2000c-6. The Title IV provisions do not, however, prevent the use of remedial racial classifications to correct imbalances caused by unlawful discrimination, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17-18 (1971), and there is no reason to construe the identically worded section of Title VII differently.

2. *The Legislative History of the 1972 Amendments to Title VII*

Any doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which comprehensively revised Title VII. See *Regents of the University of California* v. *Bakke, supra*, 30-31 n.28 (opinion of Brennan, White, Marshall and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 753 (1972).

Congress once again addressed the problem of employment discrimination because it found that in spite of the 1964 Act, many of the old patterns of racial exclusion remained. See S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971). The 1972 Act extended Title VII to new groups of employers and strengthened the authority of the Equal Employment Opportunity Commission. The Act also confirmed the authority of both federal courts and federal agencies to order race-conscious numerical relief to remedy the exclusionary effects of past discrimination.

Prior to the enactment of the 1972 amendments, the federal courts regularly, and with notable uniformity, ordered class-wide race-conscious remedies for unlawful discrimination. As the Sixth Circuit stated in an often-cited opinion, a contrary course "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." *United States* v. *Electrical Workers, Local 38*, 428 F.2d 144, 149-150, cert. denied, 400 U.S. 943 (1970). Among the forms of class-wide affirmative relief that were ordered was the use of numerical ratios to correct the exclusionary effects of past discrimination. See, *e.g.*, *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), affirming 315 F. Supp. 1202, 1247-1250 (W.D. Wash. 1970), cert. denied, 404 U.S. 984 (1971); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Carpenters, Local*

169, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 851 (1972).

Congress was aware of the court decisions ordering or upholding numerical relief as a remedy for violations of Title VII. See S. Rep. No. 92-415, *supra*, at 21, 27-28; H.R. Rep. No. 92-238, *supra*, at 8, 13; 118 Cong. Rec. 1664-1676 (1972) (remarks of Sen. Javits and text of opinions); *id.* at 1676 (remarks of Sen. Williams). Amendments were introduced in both the House and the Senate to restrict federal agencies from ordering the use of numerical ratios in hiring, but the amendments were defeated. See 117 Cong. Rec. 32111 (1971); 118 Cong. Rec. 1676 (1972); *id.* at 4918. Senator Javits, the co-floor leader of the bill in the Senate, noted that the amendments would terminate "the whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII."[16] *Id.* at 1664. Referring to court decisions that had approved numerical relief in Title VII cases, he stated (*id.* at 1665):

> [T]he amendment, in addition to the dismantling [of] the Executive order program, would deprive the courts of the opportunity to order affirmative action under title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment

[16] Senator Ervin was the leader in the Senate of the attack on the use of numerical ratios in the enforcement of both Title VII and the Executive Order. As we shall discuss in more detail in connection with the Executive Order, see *infra* at pages 64-70, the use of numerical relief was sustained with respect to both programs.

> and thereby further dismantle the effort to correct these injustices.

Referring to two other cases in which numerical relief had been ordered in consent decrees obtained by the Department of Justice, Senator Javits argued (*id.* at 1675) that the amendment

> would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired * * *.

Senator Williams, the other co-floor leader, stated that a prohibition against numerical relief "would strip Title VII * * * of all its basic fiber." *Id.* at 1676. These views, which prevailed in the Senate, were shared by the House, where the Committee that reported out the bill wrote: "Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 16 (1971).[17]

Congress not only rejected these restrictive proposals but also affirmatively expanded the remedial

[17] Congressional awareness of the decisions that had ordered numerical relief in Title VII cases was particularly significant in light of the understanding that, where the 1972 amendments did not specifically change the law, "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972) (section-by-section analysis of H.R. 1746).

authority of the courts. Section 706(g) was amended to add to the various remedies already authorized the sweeping power to order "any other equitable relief as the court deems appropriate." This amendment was intended to make clear that courts were meant to have "wide discretion in exercising their equitable powers to fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972) (section-by-section analysis of H.R. 1746). In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination.

C. Title VII Permits Private Parties to Take Affirmative Action to Remedy Apparent Employment Discrimination Similar to the Relief that a Court May Order to Remedy Proven Discrimination

In enacting Title VII, Congress expressed a clear preference for voluntary compliance as a means of combating employment discrimination. See 42 U.S.C. 2000e-5(b) and 2000e-5(f)(1); *Regents of the Univesrity of California* v. *Bakke*, *supra*, slip op. 41 n.38 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-848 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). That

preference is founded upon sound public policy considerations. Employers and unions are far better situated than courts or government agencies to fashion methods for remedying past discrimination while minimizing disruption to the business and accommodating, to the greatest extent possible, the interests and expectations of other employees. Cf. *Furnco Construction Co.* v. *Waters*, No. 77-369 (June 29, 1978), slip op. 10. Voluntary compliance avoids the expense, delay, and rancor often associated with complex Title VII litigation; it reduces governmental intervention into business affairs; and it allows the government's enforcement and monitoring resources to be concentrated in those areas where they are most needed.

To be sure, Congress has equipped the courts and agencies with the authority to take coercive measures when voluntary compliance fails, but the very purpose of these measures is to " 'provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-418, quoting from *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). A rule prohibiting voluntary compliance would convert coercive relief—a last resort remedy under the law—into the sole remedy.

That voluntary remedial action may be race-conscious does not render it unlawful. Title VII was

designed in part to change habits of discrimination and to persuade employers and unions, who had been hostile or indifferent to the rights of minorities, to correct exclusionary practices. As we have noted, Congress has required employers to be race-conscious in developing, analyzing, and altering their employment practices, notwithstanding that the results of those decisions will frequently reduce the existing expectations of white employees or applicants. Indeed, Title VII permits employers to change their employment practices for racial purposes even when such changes would not be required by the Act. For example, a company and union may have established a bona fide departmental seniority system which, because of pre-Act discrimination, locks minorities into the less desirable jobs. Although such a system could withstand legal challenge, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), nothing in Title VII would prohibit the union and the employer from agreeing to alter the seniority system so as to enhance the opportunities of minority employees. "[E]ven though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement * * * the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of racial discrimination [is consistent with] a national policy objective of the 'highest priority' * * *." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778-779 (1976). Similarly, even when not required to do so by the Act,

an employer may recruit minorities, cf. *Washington* v. *Davis*, 426 U.S. 229, 246 (1976), or make use of minority referral sources to fill jobs, cf. *Furnco Construction Co.* v. *Waters*, *supra*, slip op. 4-5. Thus, "[a]lthough Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute." *Regents of the University of California* v. *Bakke*, *supra*, slip op. 19 n.17 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The court of appeals agreed that "voluntary compliance in eliminating unfair employment practices is preferable to court action, and that private settlement without litigation is the central theme of Title VII" (Pet. App. 16a). But the court held that an employer could not undertake voluntary, race-conscious action unless it proved that it had engaged in discrimination (Pet. App. 18a-19a). Moreover, the court appeared to conclude that the permissible scope of the employer's remedial action would be limited to restoring particular victims of the employer's discrimination to their rightful places in the employment scheme (Pet. App. 20a). This restriction of the permissible scope for voluntary action would effectively choke off voluntary remedial action altogether.

As a practical matter, few employers can be expected to admit or seek to prove that they have discriminated against minorities or women, since to do so would open the way for successful suits by the

victims for backpay and injunctive relief. Moreover, by imposing such a narrow limit on voluntary affirmative action, the holding of the court of appeals would create an unjustified and arbitrary distinction between the kind of action that can be taken in response to a lawsuit and the kind of action that can be taken on a voluntary basis. Indeed, the fallacy of an approach that conditions affirmative remedial action on an admission or proof of past discrimination is well illustrated by the facts of the present case. In 1974, seven blacks were selected for the Gramercy training programs. If those blacks had accused Kaiser of past discrimination and Kaiser had concluded that those allegations had factual support, the company presumably could have settled the matter by offering these seven persons priority selection into a training program. Similarly, if the government or a class of black employees had accused Kaiser of discriminating on a class-wide basis, Kaiser could have agreed, either by consent decree or by conciliation before litigation, to adopt affirmative action measures such as instituting training programs like the ones in this case. In a suit collaterally attacking this remedy, Kaiser would not be required to admit or prove its past discrimination. In fact, consent decrees and conciliation agreements commonly contain affirmative action obligations, including goals and timetables; but their validity is not undermined by boilerplate disclaimers of past discrimination. See, *e.g.*, *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, *supra*.

The Fifth Circuit made the same point when it upheld the nationwide steel consent decree, which contained numerical goals for craft training identical to those involved in this case, see *United States* v. *Allegheny-Ludlum Industries, Inc., supra,* 517 F. 2d at 849:

> Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope for recovery and hence no basis for a compromise.

See also *United States* v. *City of Jackson,* 519 F.2d 1147, 1152 (5th Cir. 1975).

Of course, consent decrees and conciliation agreements are not immune from judicial scrutiny when they affect the interests of third parties. Voluntary affirmative action programs devised prior to litigation should be subject to similar scrutiny, so as to ensure that the programs are reasonably tailored to the apparent violation that they are designed to remedy. But, as in the case of settlement agreements and consent decrees, the court should not insist on clear proof of a violation by the employer against the particular persons benefitted by the affirmative action program.

The Equal Employment Opportunity Commission has promulgated guidelines setting standards for the approval of voluntary affirmative action programs under Section 713(b)(1) of Title VII, 42 U.S.C. 2000e-12(b)(1). Affirmative Action Guidelines, 44 Fed. Reg. 4421 (1979). The Commission's Guidelines state what we submit is the proper standard

for evaluating voluntary affirmative action programs. Under the Guidelines, affirmative action is appropriate where an employer, after analyzing its employment practices, finds a reasonable basis for believing that race-conscious action is required to bring it into compliance with Title VII or to remedy past violations of the Act. 44 Fed. Reg. 4426-4428 (1979). Pertinent portions of the Guidelines are reproduced as Appendix B to this brief.

The Guidelines represent the considered judgment of the Commission, the administrative body charged with the primary responsibility for the enforcement of Title VII. Moreover, the Guidelines incorporate the principles developed in prior administrative policy statements on the question of affirmative action by agencies that share with the Commission the responsibility for enforcing the Act. See Memorandum on Goals and Timetables, 1 Empl. Prac. Guide (CCH) ¶ 3775 (1973) (reproduced as Appendix D to this brief); Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38814 (1976) (reproduced as Appendix C to this brief); Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978).

As an administrative interpretation of Title VII by the enforcing agency, the Guidelines are "entitled to great deference." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 433-434.[18] Because "the Act and

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[18] See also, *e.g., Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142 n.4 (1977); *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 279-280 (1976); *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 429, 430-435. This is not a situation,

its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Ibid.* Indeed, four members of this Court have specifically endorsed the Commission's Guidelines as "authorizing employers to adopt racial preferences as a remedial measure when they have a reasonable basis for believing that they might otherwise be held in violation of Title VII." *Regents of the University of California* v. *Bakke, supra,* slip op. 41 n.38 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).[19] Under the standard set forth in the Guidelines, the affirmative action program in this case is lawful.

D. Kaiser Could Reasonably Believe It Would Be Found Liable for Discriminating Against Blacks at the Gramercy Plant

Kaiser and the Steelworkers adopted the race-conscious training programs in part because of fear of Title VII suits by minority applicants or employees (Pet. App. 3a, 65a). Although Kaiser officials insisted there had never been discrimination at

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such as was presented in *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-145 (1976), where a Commission guideline was inconsistent with prior and more contemporaneous Commission interpretations, as well as with interpretations of other federal agencies charged with enforcing anti-discrimination laws. See *Nashville Gas Co.* v. *Satty, supra,* 434 U.S. at 142 n.4.

[19] Although the opinion in *Bakke* referred to the Commission's proposed Guidelines, the final Guidelines have since been published. They contain the same standard for approval of affirmative action programs.

the Gramercy plant, they admitted that they were not confident that a court would agree with them, in light of the low minority representation in the plant's unskilled jobs and the near absence of blacks from the skilled craft positions (A. 83, 97, 145).

Because Kaiser and the Steelworkers were in the awkward position of seeking to defend their training programs without admitting liability for previous discrimination against blacks, and because Weber had no incentive to prove that Kaiser had discriminated against blacks in the past, the record does not establish in detail the factual basis for Kaiser's concerns. Even from the limited record developed at trial, however, it is clear that Kaiser had ample grounds to conclude that it could be held liable for discriminating against blacks at the Gramercy plant.

The record shows that in 1969 only about 10 percent of Kaiser's unskilled production workers were black, although the local labor force at that time was approximately 39 percent black. This disparity is so great that in a suit alleging discrimination against blacks at the Gramercy plant, it would constitute prima facie evidence of unlawful discrimination in hiring. See *Dothard* v. *Rawlinson,* 433 U.S. 321, 329-331 (1977); *Hazelwood School District* v. *United States,* 433 U.S. 299, 307-309 (1977); cf. *Castaneda* v. *Partida,* 430 U.S. 482, 496-497 (1977). The testimony at trial that Kaiser had a no-discrimination hiring policy and had sought to hire the "best qualified" applicants (A. 77-78, 82) would have done nothing to rebut the strong inference of discrimina-

tion arising from the huge disparity between the black representation in the unskilled jobs at the Gramercy plant and the black representation in the local labor force. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342-343 n.24 (1977); *Dothard* v. *Rawlinson, supra; Albemarle Paper Co.* v. *Moody, supra.*

There was even more cause for Kaiser's concern that it could be found liable for discrimination in hiring for the skilled craft jobs at the Gramercy plant. Kaiser adopted the training programs because it "had no blacks in the crafts to speak of" (A. 83). At the time it adopted the programs, there were only five blacks among almost 300 craftsmen at the Gramercy plant. Although there was no evidence at trial of the percentage of skilled minority craftsmen in the local labor market, the minority representation in the craft jobs was so low as to approach the "inexorable zero." See *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 342 n.23.

The testimony at trial that black representation in the craft jobs at Gramercy was low because skilled black craftsmen were unavailable is subject to question in light of census statistics regarding the number of black craftsmen in the area.[20] Those statistics show that although blacks are under-represented in

[20] Courts regularly take judicial notice of census data in Title VII cases. See, *e.g.*, *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 n.6; *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1185 & n.36 (5th Cir.), cert. denied, 429 U.S. 861 (1976).

the skilled crafts in Louisiana, they are not nearly so underrepresented as they were in the craft jobs at the Gramercy plant. According to 1970 census data, blacks constituted 22.7 percent of the State's total experienced male civilian labor force. U.S. Bureau of the Census, *1970 Census of Population: Characteristics of the Population*, Vol. 1, Part 20, Louisiana, table 172. Of the craftsmen and kindred workers, 15.7 percent were black. *Ibid.*[21] Unless conditions in the Gramercy area were grossly atypical of the State and the neighboring areas of New Orleans and Baton Rouge, the availability of skilled black craft workers was much greater than their representation in the

[21] According to the census figures, the statewide black representation in the skilled crafts covered by the affirmative action programs ranged from 21.3 percent (for carpenters) to 3.0 percent (for electricians). Blacks comprised 14.6 percent of the State's mechanics and repairmen and 10.4 percent of the State's machinists. U.S. Bureau of the Census, *1970 Census of Population: Characteristics of the Population*, Vol. 1, Part 20, Louisiana, table 172.

With respect to the Gramercy area itself, published census data indicate that more than 20 percent of the craft and kindred workers in St. James and St. John the Baptist parishes were black. *Id.* at tables 122 and 127. Data for these parishes are not broken down in detail by craft because these parishes are not in a Standard Metropolitan Statistical Area. But the detailed statistics for the adjacent New Orleans and Baton Rouge SMSA's, from which the Gramercy plant recruited (A. 62), are consistent with those for the State as a whole. U.S. Bureau of the Census, *1970 Census of Population, supra*, at table 172. Moreover, because the black representation in the labor force is approximately twice as great in the Gramercy area as in the State as a whole, it is reasonable to assume that the proportion of blacks in the skilled crafts in the area is at least as high as in the State generally.

craft categories at the Gramercy plant prior to the institution of the training programs.

The testimony of Kaiser officials that Kaiser was unable to recruit significant numbers of blacks who could meet its qualifications for entry into the craft categories is of little probative force in the absence of evidence as to what those qualifications were. One qualification that was revealed at trial was a requirement that an applicant have at least five years' industrial experience in the craft for which he was applying. As Kaiser officials admitted, this requirement disqualified blacks who had been excluded from industrial craft jobs and training programs in the past. Because of its exclusionary racial effect, the requirement of lengthy prior experience would be lawful only if justified as a business necessity. See *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 348-349.

In evaluating the basis for Kaiser's concern that it could be found to have discriminated against blacks in the craft jobs at Gramercy, it is instructive to consider Kaiser's experience at its two other Louisiana plants. At the same time that Kaiser was defending its affirmative action efforts in this case, it was defending employment discrimination suits brought by black employees of its plants in Baton Rouge and Chalmette, Louisiana. Litigation arising from its Baton Rouge plant was settled by a consent decree requiring Kaiser to pay $255,000 to the plaintiff class. *Burrell* v. *Kaiser Aluminum & Chemical Corp.*, Civ. Action No. 67-86 (M.D. La.), consent decree

filed February 24, 1975. And in the action arising from the nearby Chalmette plant, the plaintiffs were held to have established a prima facie case of discrimination against blacks in hiring for craft positions on the basis of statistics strikingly similar to those of the Gramercy plant before the 1974 training program was instituted. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978). The Fifth Circuit noted in the *Parson* case that Kaiser had imposed a requirement of prior industrial experience as a prerequisite to entry into the craft positions, just as it had done at Gramercy, and it held that the preclusive effect of that requirement on blacks was so substantial as to impose on Kaiser the burden of showing that the prior experience requirement has " 'a manifest relationship' " to the legitimate needs of the craft positions. 575 F.2d at 1390. The court noted that a defense of business necessity to validate the prior experience requirement "must meet rigorous standards." 575 F.2d at 1390 n.33.[22]

Accordingly, even on the limited record available in this case, it is clear that Kaiser faced a very

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[22] The court in *Parson* noted that in the past Kaiser had required applicants for craft positions to pass the Wonderlic test and a written test on craft skills, and to have a high school diploma—requirements that the court termed "incidents of past bias." 575 F.2d at 1390. There was no evidence of what prerequisites had been imposed at the Gramercy plant, in addition to the requirement of prior industrial experience, but there were allusions in the course of trial to other qualifications that were required for entry into the craft categories at Gramercy (A. 62, 63, 65, 71).

real prospect of being found liable for discriminating against blacks at Gramercy, at least in hiring for craft jobs, if a suit had been brought. The statistical case would have been extraordinarily strong; the flat five-year requirement of prior industrial experience would have been difficult to defend on grounds of business necessity;[23] and Kaiser's protestations that it had followed a policy of non-discrimination would have been entitled to little or no weight.

E. The Gramercy Training Programs Were Appropriate Remedies for the Apparent Title VII Violations In Hiring for the Craft Positions

The remedial plan adopted by Kaiser and the Steelworkers was appropriately designed to remedy the effects of the apparent past discrimination at Gramercy while at the same time minimizing the adverse impact on the expectations of incumbent white employees. The plan had several discrete features: it provided for training craftsmen rather than hiring craftsmen who were already trained; it made the training program available exclusively to employees

[23] It is not established in the record that any amount of prior industrial experience is necessary to perform each of the craft jobs. Even if some level of skill is necessary, Kaiser's flat requirement of five years of industrial experience would prevent black applicants from proving that they had the requisite skills, which they might have acquired, for example, in vocational education, in military service, by self-training, or in less than five years of work. The evidence that the five-year experience requirement was waived in some cases at the Chalmette plant suggests that the requirement may not have been a business necessity. See *Parson* v. *Kaiser Aluminum & Chemical Corp., supra,* 575 F.2d at 1381.

within the plant; it set a goal of obtaining 39 percent black representation in the craft categories; and it provided that until that level was reached, half the vacancies in the training programs would be reserved for blacks and women, if that many qualified blacks and women were available.

Each of the features of the plan was reasonable and appropriate under the circumstances. The decision to train craftsmen rather than to hire craftsmen who were already trained was reasonable in light of Kaiser's professed difficulty in locating black craftsmen with the necessary training or experience. The decision to limit the training program to employees already working in the plant was also reasonable in light of the union's preference for training programs that would enhance the employment opportunities of incumbent employees rather than continuing to make the most attractive jobs at the plant available only to persons hired from outside the plant.

Of course, respondent does not complain that new training programs were established for the craft jobs. Nor does he complain that incumbent employees were selected for the programs. Both of these decisions, motivated by the company's desire to engage in affirmative action, provided new opportunities for respondent and the class he represents. But it was the decision to offer training programs to current employees that necessitated the use of separate bidding lists for blacks and whites. If Kaiser had filled its training program with applicants from outside

the plant, random selection presumably would have produced a class of trainees that was 39 percent black—equal to the black representation in the local labor force. Within the plant, however, blacks comprised only 15 percent of the work force. Moreover, the blacks in the plant were concentrated in the lower ranges of the seniority lists because prior to 1969, the plant's work force was only about 10 percent black. Once having decided to make the training programs available to current employees, Kaiser and the Steelworkers thus had to devise a system that would cure the basic evil that the program was designed to remedy—the failure to hire black craftsmen. With the proportion of blacks in the plant's work force so low, particularly among the most senior employees, strict reliance on seniority to select trainees would simply have perpetuated the effects of previous hiring practices. Thus, it was reasonable for Kaiser and the Steelworkers to try to break the hold of those practices by establishing a goal of having 39 percent black craftsmen, while using separate bidding lists for the training program.

The court of appeals deemed the training programs inappropriate in part because they "meddled" with seniority. But the training programs did not upset any previous expectations based on the seniority system at Gramercy. Prior to the establishment of the training programs, unskilled incumbent employees had no expectations whatever for entry into the skilled craft jobs. The training programs created wholly new expectations and opportunities for incumbent employees. The company and union agreed

to make this training newly available to the unskilled employees, but on terms other than the traditional strict seniority basis. Even if employees may have a general expectation that employment benefits ordinarily will be allocated on the basis of seniority, that expectation is subject to modification through collective bargaining, see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), particularly for the purpose of countering the effects of past discrimination. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 778-779.

Finally, the use of a one-for-one ratio in selecting trainees was reasonable, for several reasons. First, even though the training programs were undertaken to provide a means for blacks to gain entry to the skilled crafts, whites were not excluded from the program. By allocating half the vacancies to whites, the programs offered new training and employment opportunities for all of the plant's employees. See *Carter* v. *Gallagher*, *supra*, 452 F.2d at 330. Second, because only qualified employees were allowed to bid for the programs, and because prior experience and training were not required, "less qualified" blacks were not preferred over "more qualified" whites (see Pet. App. 20a). Third, the one-for-one selection ratio for minorities and women is not indefinite; according to the 1974 agreement, it will end when minority representation in the craft categories is equal to minority representation in the local work force. See *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974). Fourth, to the extent that

women are selected for the program and mostly white craftsmen continue to be hired directly from outside the plant (see page 10, *supra*), the selection ratio may not result in more black craftsmen than would have been chosen had selections for the training programs been made at random from the local labor force.[24]

It is true, of course, that the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant. But, as we have discussed, class-wide numerical relief need not always be limited to identifiable victims. This principle is particularly applicable in the context of voluntary compliance. An identification of individual victims would require an admission of unlawful discrimination in the past and a specification of those persons who suffered as a result of that discrimination. An employer could not ordinarily be expected to attempt voluntary compliance at the price of conceding back pay liability to each of the "identified" victims.

Moreover, there is no mechanism available in the context of voluntary remedial programs for identifying specific victims from the broader category of po-

[24] It is, accordingly, unnecessary in this case for the Court broadly to decide the circumstances in which, and the extent to which, "catch-up" numerical relief can properly be used as a remedial device under Title VII. By utilizing a substantially higher percentage of minorities than are reflected in the local work force, such remedies enable the latter percentage to be approximated, and the remedial use of numerical ratios to end, in a time span shorter than that required for a complete personnel turnover. They have been widely used in court-ordered remedies. See *e.g.*, cases cited in note 14, *supra*.

tential victims;[25] there is no ready equivalent to the adjudicatory "remedy" stage proceedings in a "pattern or practice" suit. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 371-372. And even if some mechanism could be devised for identifying victims in the course of voluntary compliance efforts, the cost and delay of that effort would be prohibitive.[26] Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified. See *Equal Employment Opportunity Commission* v.

[25] Each black selected for the programs was at least a potential victim of discrimination. Blacks hired at the Gramercy plant were not able to bid for skilled craft jobs because of the five years' prior industrial experience requirement, which had a severe exclusionary racial effect. If that requirement were not validated, all blacks hired when it was in effect would be in a broad class of potential victims. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-371.

[26] In the nationwide steel consent decree case, it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would consume 28 years of trial time. *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 851 n.28.

American Telephone & Telegraph Co., supra, 556 F.2d at 177.

In sum, the Gramercy training programs were a reasonable and appropriate response to a problem that was accurately perceived as creating a potential for liability under Title VII. That the plan was race-conscious is directly attributable to the previous hiring practices at Gramercy that created the potential for liability and to the perception by Kaiser and the Steelworkers that appropriate voluntary action would be preferable to inaction, which could result in litigation and ultimately in remedial orders imposed by a court rather than designed by Kaiser and the Steelworkers.

F. Title VII Authorizes Employers To Take Affirmative Action in Response to Executive Order 11246

Kaiser and the Steelworkers adopted their race-conscious training programs in part to satisfy the affirmative action requirements of Executive Order 11246 (Pet. App. 65a; A. 93). The Executive Order and the regulations promulgated under the authority of the Order require government contractors such as Kaiser not only to refrain from discrimination in employment, but also to take affirmative action to redress the underutilization of minorities in their work force.

The court of appeals held that the Executive Order did not justify the use of a racial criterion for selection to the training programs at Gramercy in the absence of proof of discrimination in hiring or promotion at the Gramercy plant (Pet. App. 25a). To the extent the Executive Order purports to authorize the use of a racial criterion without proof that the employer has discriminated, the court held that it is inconsistent with Title VII and must give way (*ibid.*).

We disagree with the court of appeals that the Executive Order program conflicts with Title VII. It is clear from the legislative history that Congress considered the Executive Order program to be consistent with Title VII and understood that the affirmative action obligations imposed by the Executive Order are not premised on any finding of previous discrimination by each affected employer. Therefore, action taken voluntarily in conformity with the Executive Order does not violate Title VII.

There is, however, no need in this case to consider whether, or to what extent, Title VII permits the Executive Order to authorize or require government contractors to undertake affirmative action measures that would be impermissible if undertaken by other employers. For the reasons we have shown, the Gramercy training programs were proper under Title VII wholly apart from the fact that Kaiser is a government contractor. Therefore, the role of the Executive Order in this case, to the extent it influenced the decision of Kaiser and the Steelworkers to adopt those programs, was merely to condition the government's willingness to deal with Kaiser on the adoption of affirmative action measures that Kaiser and the Steelworkers were free to adopt voluntarily

whether they wished to do business with the government or not.[27] This is a case, in other words, in which the Executive Order operates in particularly close tandem with Title VII.

1. *The Executive Order Program Requires Government Contractors to Take Affirmative Action, Without Need for Proof of Prior Discrimination by Each Contractor*

Racial discrimination in employment by government contractors has been prohibited by Executive Orders of every President since Franklin D. Roosevelt.[28] But the early anti-discrimination efforts failed. Twelve years after President Roosevelt's first order was issued, a study of its effectiveness revealed that "the nondiscrimination provision is almost forgotten, dead and buried under thousands of words of standard legal and technical language in Government pro-

[27] See 42 Op. Att'y Gen. 405, 409 (1969):

> [I]t is important to distinguish between those things *prohibited* by Title VII as to all employers covered by that act and those things which are merely *not required of* employers by that act. The United States as a contracting party may not require an employer to engage in practices which Congress has prohibited. It does not follow, however, that the United States may not require of those who contract with it certain employment practices which Congress has not seen fit to require of employers generally.

[28] See, e.g., Exec. Order 8802, 3 C.F.R. 957 (1938-1943 Compilation) (Pres. Roosevelt); Exec. Order 10210, 3 C.F.R. 390 (1949-1953 Compilation) (Pres. Truman); Exec. Order 10479, 3 C.F.R. 961 (1949-1953 Compilation) (Pres. Eisenhower; Exec. Order 10925, 3 C.F.R. 448 (1959-1963 Compilation) (Pres. Kennedy).

curement contracts." President's Committee on Government Contract Compliance, *Equal Economic Opportunity* 3 (1953). Most contractors had made little effort to comply with the orders, and governmental enforcement—based entirely on education and persuasion to obtain voluntary compliance—was ineffective. *Ibid.* In 1961, after further study revealed that the contract compliance program had not significantly upset habitual patterns of discrimination,[29] the President determined that passive measures were futile. President Kennedy therefore issued Executive Order 10925, 3 C.F.R. 448 (1959-1963 Compilation), which not only prohibited discrimination but also required government contractors to "take affirmative action to ensure" non-discrimination.[30] These dual provisions were repeated in Executive Order 11246, issued by President Johnson four years later.

Again, however, little progress was made. The Department of Labor, which was given general responsibility for enforcing Executive Order 11246, relied

[29] Committee on Government Contracts, *Patterns for Progress* (Final Report) 14 (1960). Another study found that "there is little awareness of the nondiscrimination requirement among the men who do the actual hiring * * *." United States Commission on Civil Rights, *Employment* 92 (1961).

[30] The preamble to Executive Order 10925 stated that the Order was issued after "a review and analysis of existing Executive orders, practices, and government agency procedures relating to government employment and compliance with existing non-discrimination contract provisions [which] reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity."

initially on persuasion and generalized recommendations. See R. Nathan, *Jobs and Civil Rights* ch. 4 (1969); Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. Rev. 590 (1969). Widespread discriminatory practices resisted these modest efforts. Exclusionary conditions proved particularly intractable in the skilled craft positions. For many years, the exclusion of minorities from membership in craft unions and from entry into union and employer-operated apprenticeship programs, and the refusal of employers to hire skilled minorities for craft positions, resulted in one of the most extreme patterns of employment discrimination in the national economy.[31] Although the pattern of discrimination in skilled craft employment was confirmed by judicial findings of discrimination in dozens of cases brought under Title VII,[32] judicial remedies in specific cases

[31] See, e.g., F. Marshall and V. Briggs, Jr., *The Negro and Apprenticeship*, ch. III (1967); F. Marshall, *The Negro Worker* 64-81 (1967); H. Northrup, *Organized Labor and the Negro* 17-47 (1944); United States Commission on Civil Rights, *Employment* 91-93, 128-131 (1961); W. Gould, *Black Workers in White Unions* ch. 10 (1977).

[32] Many of the leading cases in the employment discrimination area involved discrimination against blacks in admission to the skilled crafts. See, *e.g.*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976); *United States* v. *Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Operating Engineers, Local 520*, 476 F.2d 1201 (7th Cir. 1973); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *United States* v. *Electrical Workers, Local 38*, *supra*; *United States* v. *Ironworkers, Local 86*, *supra*.

A number of the cases in which discrimination has been found in the skilled crafts have arisen in Louisiana. See, *e.g.*, *Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Cox* v. *Allied Chemical Corp. Local 216*, 382 F. Supp. 309 (M.D. La. 1974); *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314 (E.D. La. 1970).

had little nationwide impact. In 1969, 58 percent of the nation's local craft unions reported to the Equal Employment Opportunity Commission that they had no black members; nationwide, the electricians unions were 1.9 percent black; the ironworkers 1.7 percent black; the plumbers 0.8 percent black; and the sheet metal workers 0.7 percent black. See United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* 29-30 (1976); W. Gould, *Black Workers in White Unions* 282 (1977).

The Department of Labor determined that more specific remedies were necessary to deal with the problem. In the late 1960's, the Department issued plans for Philadelphia and other areas requiring government contractors to make good faith efforts to meet pre-determined percentage ranges of minority workers in craft positions on construction jobs. These plans were based on administrative findings that the local unions had excluded minorities and that the contractors perpetuated that exclusion by

hiring only workers referred by the unions.[33] The Philadelphia Plan was premised on a hiring ratio of one minority craftsman for each non-minority craftsman for a period of four years, resulting in a minority participation level of approximately 20 percent in the six craft categories affected.[34] The Philadelphia Plan was upheld as a valid exercise of executive power and consistent with Title VII,[35] as were other local plans.[36]

The approach taken in the Philadelphia Plan proved to be of limited utility. With more than 150,000 government contractors employing more than 30 million

[33] See, e.g., *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra,* 442 F.2d at 163 (Philadelphia Plan); 41 C.F.R. Part 60-5 (1977) (District of Columbia Plan); 41 C.F.R. Part 60-6 (1977) (San Francisco Plan); 41 C.F.R. Part 60-8 (1977) (Detroit Plan); 41 C.F.R. Part 60-10 (1977) (Camden, N.J., Plan); 41 C.F.R. Part 60-11 (1977) (Chicago Plan).

[34] Pertinent portions of the Philadelphia Plan are reproduced as Appendix A to this brief. The full text of the Philadelphia Plan is reprinted in *The Philadelphia Plan: Hearings on S.931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 26-38 (1969). The one-for-one ratio is discussed in Section 3(f) of the Order, *id.* at 33-34.

[35] *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra.*

[36] See, *e.g., Southern Illinois Builders Ass'n* v. *Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971), affirmed, 471 F.2d 680 (7th Cir. 1972); *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D.N.J. 1970); *Weiner* v. *Cuyahoga Community College Dist.,* 238 N.E.2d 839 (1968), affirmed, 18 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970).

workers,[37] it was apparent that it would be impossible to design and impose specific compliance plans for all government contractors throughout the country. Accordingly, the Department of Labor turned to a more general approach to the enforcement of the Executive Order, which would rely more heavily on self-analysis and voluntary compliance.[38] In late 1971, the Department issued Order No. 4, 36 Fed. Reg. 23152, a regulation designed to provide guidance for non-construction government contractors, such as Kaiser, in evaluating their use of minority employees and in developing affirmative action programs that would bring them into compliance with the Executive Order.[39]

Order No. 4 requires contractors to analyze their work forces and identify areas in which minorities and women are underutilized in comparison with their availability in the relevant labor force (41 C.F.R. 60-2.11).[40] Where deficiencies are found to

[37] See United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, To Eliminate Employment Discrimination,* Vol. V, 390.

[38] Like Title VII, the Executive Order program is largely premised on voluntary action. See Sections 207 and 209(b) of the Executive Order and 41 C.F.R. 60-1.24(c)(2).

[39] Order No. 4, as amended, is codified at 41 C.F.R. Part 60-2. The regulations governing the affirmative action obligations of construction contractors are codified at 41 C.F.R. Part 60-4.

[40] The factors to be considered include the proportion of minorities in the local population and in the local labor market, the availability of skilled minorities and the degree of training that could reasonably be undertaken to make all job classes open to minorities.

exist, contractors must seek to eliminate or modify employment practices causing or perpetuating the underutilization. In addition, employers must take affirmative action to redress the underutilization of minorities in their work forces, regardless of whether the underutilization was caused by their discrimination or that of other employers. 41 C.F.R. 60-2.12, 60-2.24. See Summary on Retaining OFCC in the Department of Labor, 118 Cong. Rec. 1395-1396 (1972). The adequacy of the employer's self-analysis and the appropriateness of any resulting affirmative action plans are reviewed and approved through the federal contract compliance program.

In Order No. 4, the Department of Labor stated that based upon its experience with compliance reviews under the Executive Order programs and the contractor reporting system, it found that skilled craft jobs are among those in which "minority groups are most likely to be underutilized." 41 C.F.R. 60-2.11. The Department therefore instructed contractors to direct special attention to such jobs in conducting their analyses and setting their goals. Moreover, in light of a finding by the Committee on Government Contracts that minorities are underrepresented in skilled jobs in part because they have had fewer training opportunities open to them,[41] the Order directed contractors to consider undertaking training programs, if reasonable, as a means of making more jobs available to minorities. 41 C.F.R. 60-2.11(b)(1)(viii).

[41] Committee on Government Contracts, *Patterns for Progress* (Final Report), *supra*, at 15.

2. *The Executive Order Program is Consistent with Title VII*

The legislative history of Title VII—particularly the legislative history of the 1972 amendments to the Act—establishes that affirmative action taken pursuant to the Executive Order is not barred by Title VII. *Regents of the University of California* v. *Bakke, supra*, slip op. 30 n.28 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

At the time Title VII was enacted, Congress was well aware of the Executive Order program, and it approved the efforts of various federal agencies to eliminate employment discrimination in industries receiving federal contracts.[42] See Section 709(d) of Title VII, 42 U.S.C. 2000e-8(d); H.R. Rep. No. 914, 88th Cong., 1st Sess. 28-29 (1963). Moreover, it was clear that Title VII was not intended to impede the authority of the President, under the Executive Order program, to combat discrimination among federal contractors. In their interpretative memorandum, which explained Title VII to the Senate at the commencement of the Senate debate, Senators Clark and Case outlined the function and authority for the

[42] The substantive provisions of Executive Order 11246 are identical to those of Executive Order 10925, which was in effect at the time Title VII was enacted, except that Executive Order 11246 requires non-discrimination and affirmative action on grounds of sex, requirements that became effective in 1968. See Executive Order 11375.

Executive Order program and added that Title VII "has no effect on the responsibilities of the [President's Committee on Equal Employment Opportunity] or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts." 110 Cong. Rec. 7215 (1964). See also *id.* at 2575 (remarks of Rep. Celler); 109 Cong. Rec. 3248, 11178 (1963) (messages of Pres. Kennedy).[43]

When Title VII was amended in 1972, the Secretary of Labor's regulations imposing numerical requirements on construction contractors in specific locations had been in effect for several years, and the general regulations imposing affirmative action requirements on all government procurement contractors had recently been promulgated. The goals and timetables required under both programs were imposed without regard to whether each employer covered by the program had discriminated in employment. See 118 Cong. Rec. 1397 (1972). As the debates over the 1972 Act make clear, Congress was aware of these developments.[44] Moreover, in the

[43] Senator Tower introduced an amendment that would have made Title VII the exclusive federal remedy for employment discrimination, see *id.* at 13650-13652. The amendment was defeated, thus supporting the view that Congress contemplated the continuation of the Executive Order program.

[44] Congress's attention had been focused on the Philadelphia Plan two years earlier, when after spirited debate, both houses rejected efforts to curb the Executive Order program on the ground that it imposed numerical hiring requirements. See Comment: *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 747-757 (1972).

course of its consideration of the 1972 Act, Congress demonstrated in several respects its approval of the Executive Order program and its view that the program was consistent with Title VII, even when it required affirmative action by employers who had not themselves discriminated.

First, the debate over whether to leave the enforcement of the Executive Order with the Department of Labor demonstrated Congress's concern that the Executive Order be vigorously enforced in tandem with Title VII. The 1972 bill initially contained a provision that would have transferred enforcement of the Executive Order from the Labor Department to the Equal Employment Opportunity Commission. The transfer was proposed because of sentiment in Congress that the Labor Department had not been vigorous enough in enforcing the Executive Order. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 29-31 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 14-16 (1971); 118 Cong. Rec. 1387-1391 (1972) (remarks of Sen. Williams); *id.* at 1394 (remarks of Sen. Javits). The Senate Committee wrote (S. Rep. No. 92-415, *supra*, at 31):

> The rights of minorities and women are too important to continue this important function in an agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. It should have a chance to operate in a fresh atmosphere with an agency

that has Equal Employment Opportunities as its sole priority.

In support of the transfer provision, Senator Williams referred to the affirmative action obligations imposed by the Executive Order (118 Cong. Rec. 1389 (1972)):

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort regardless of the past history of the employer to upgrade and improve its minority work force.

On the Senate floor, Senator Saxbe proposed an amendment to strike the transfer provision from the bill. Although he disagreed that the Department of Labor had failed to enforce the Executive Order adequately, his view of the affirmative action obligations imposed by the Order was the same as Senator Williams'. He noted that unlike court-ordered remedies under Title VII, numerical remedies under the Executive Order are not contingent upon findings of unlawful discrimination (*id.* at 1385):

> The Executive order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

Senator Saxbe's amendment was adopted. *Id.* at 1398.[45]

Second, Senator Ervin introduced a series of amendments intended to prevent federal officials from imposing numerical hiring requirements under the Executive Order program. See *id.* at 1662, 3367, 4917. The principal amendment would have prohibited any "department or agency or officer of the United States" from requiring any employer to hire "persons of a particular race * * * in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 Cong. Rec. 1663 (1972). As Senator Ervin freely acknowledged, the amendments were intended to curb the Philadelphia Plan in particular and the entire Executive Order program in general (*ibid.*).

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[45] Senator Javits also distinguished between the two purposes of the Executive Order program. Quoting from the Third Circuit's decision in *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra,* he noted that the court had upheld the Executive Order program not only as a means to remedy past discrimination in the six building trades there at issue, but also to encourage full utilization of all minority-group employees. 118 Cong. Rec. 1664 (1972). See also *id.* at 4918 (remarks of Sen. Javits).

Members of the House similarly recognized that the Executive Order remedies were not limited to cases of proven discrimination. See, *e.g.*, 117 Cong. Rec. 32091 (1971) (remarks of Rep. Ford); *id.* at 32105 (remarks of Rep. Mink). And in both the House and Senate, there were repeated references to the *Contractors Association* decision, which had held (442 F.2d at 177) that numerical remedies under the Executive Order program were justified "without regard to a finding as to the cause of the situation." See, *e.g.*, 117 Cong. Rec. 31963 (1971); *id.* at 31975; 118 Cong. Rec. 1671 (1972).

As we have noted in connection with the discussion of the remedies Congress intended to be available under Title VII, Senator Javits led the opposition to the Ervin amendments and characterized them as an attack on "the Philadelphia Plan and similar plans in other cities, and beyond that, the whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII" (118 Cong. Rec. 1664 (1972)). He read into the Congressional Record the Third Circuit's opinion upholding the Philadelphia Plan (*id.* at 1665-1671), and he urged the Senate to confirm the principle that the government "has discretion as to whom it will contract with and will not contract with, to affirmatively encourage nondiscrimination and full utilization of minority group employees and women," *id.* at 4918. The Ervin amendments were each defeated. A similar amendment was proposed in the House; it too was defeated. 117 Cong. Rec. 32111 (1971).

Finally, having rejected the proposal to prohibit the use of numerical hiring goals in the Executive Order program, Congress nonetheless adopted a procedural provision, which was codified as Section 718 of Title VII, 42 U.S.C. 2000e-17, to protect contractors against possibly arbitrary contract termination actions by the OFCCP. Thus, Congress's decision to leave the substantive provisions of the Executive Order program unchanged does not represent a determination to forgo legislating on this matter altogether. Congress modified those aspects of the

Executive Order program with which it disagreed, but the substance of the program—including the use of affirmative remedies—was deliberately left intact.

In sum, Congress recognized that although the Executive Order and Title VII derive their authority from different sources and operate in somewhat different ways, the two are wholly compatible.[46] As the House Committee noted, in reporting the bill that became the Equal Employment Opportunity Act of 1972, "The two programs [Title VII and the Executive Order program] are addressed to the same basic mission—the elimination of discrimination in employment. The obligations imposed on the government contractor by the Executive Order * * * reinforce the obligations imposed by Title VII." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 15 (1971).

The court of appeals thus erred in holding that the Executive Order is inconsistent with Title VII to the extent that it imposes affirmative action obligations on an employer in the absence of proof of previous discrimination by that employer. Congress expressed its desire not to prohibit the Department of Labor from urging, and employers from adopting, affirma-

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[46] That Congress viewed Title VII and the Executive Order program as compatible is further underscored by the addition of Section 715 as one of the 1972 amendments to the Act. That provision, which established the Equal Employment Opportunity Coordinating Council, was added to ensure coordination between the Executive Order program and Title VII enforcement efforts. See 118 Cong. Rec. 1398 (1972) (remarks of Sen. Javits).

tive action plans of the kind contemplated by the Executive Order program.

3. *The Gramercy Training Programs Were Consistent With the Executive Order Program*

The race-conscious measures taken by Kaiser and the Steelworkers at the Gramercy plant closely parallel the kinds of affirmative action programs that have been required by the Executive Order at least since the time of the Philadelphia Plan. As we have noted, the Philadelphia Plan was premised on findings of discrimination in the local industry that was the target of the plan, not on any findings that the contractors who received federal funds had themselves been guilty of employment discrimination. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra,* 442 F.2d at 163, 173. The Philadelphia Plan was an attempt to eradicate the effects of employment discrimination in the local construction industry as a whole, not simply to combat discriminatory actions taken by each employer or union.

Similarly, Kaiser and the Steelworkers sought to eliminate the effects of previous employment discrimination that had blocked the entry of minority workers into skilled craft jobs. Kaiser officials were aware that the paucity of trained black craftsmen was attributable in large part to discrimination in the building trades industry. One of the Kaiser officials testified (A. 63):

> Most of the training for craftsmen over the years has come through the building trades. They have apprenticeship programs, whereby a candidate spends four or five years in an apprenticeship program, and he graduates as a skilled craftsman. Until just recently, blacks did not get into those building trades programs.

Kaiser's director of equal opportunity affairs testified to the same effect, stating that in his view minority workers had less opportunity to enter skilled craft jobs as "a direct result of employment discrimination over the years, the lack of opportunity on the part of [minorities] to obtain the kind of training that was necessary to achieve the skills" (A. 90). Minority workers "had not been permitted to participate in certain skilled occupations and, therefore, they couldn't be available in any quantity in the market place" (A. 93). At other plants, Kaiser had sought to hire minority craftsmen through the building trades unions that represented its craft employees, but "in the majority of situations, they were unable to because there weren't any in the building trades" because of discrimination against minorities in that industry (A. 104).

In fashioning the plan for race-conscious training programs, Kaiser recognized that unless some such steps were taken "to change the pattern, * * * there would be no change in the present effects of past discrimination, as it relates to craft occupations" (A. 91). The plan that the company and the union settled on was consistent with the basic approach em-

ployed under the Executive Order in both the Philadelphia Plan and Order No. 4. It used on-the-job training programs to overcome the effects of discrimination in craft jobs in the building industry;[47] it established an ultimate goal based on the minority representation in the local labor force;[48] and it provided for a hiring ratio of minorities and women designed to attain that goal within a reasonable period of time without foreclosing white employees from the training programs.[49]

Thus, the congressional approval, previously discussed, of similar affirmative action measures taken pursuant to the Executive Order program makes it clear that voluntary action of the kind taken in this case is consistent with, and not prohibited by, Title VII.

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[47] See Philadelphia Plan, Memorandum Section 6(c)(3), Order Section 3(c) and (f); Order No. 4, 41 C.F.R. 60-2.11(a), 60-2.11(b)(1)(viii), 60-2.20(a)(1).

[48] See Philadelphia Plan, Memorandum Section 6(c)(2), Order Section 3(a); Order No. 4, 41 C.F.R. 60-2.11(b)(1)(iii).

[49] See Philadelphia Plan. Order Section 3(e) and (f); Order No. 4, 41 C.F.R. 60-2.12(d) and (g).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1979

APPENDIX A

THE PHILADELPHIA PLAN

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C., June 27, 1969

MEMORANDUM

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary of Wage and Labor Standards.

Subject: Revised Philadelphia Plan for Compliance With Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

1. Purpose

The purpose of this Order is to implement the provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto, requiring a program of equal employment opportunity by Federal contractors and subcontractors and Federally-assisted construction contractors and subcontractors.

2. Applicability

The requirements of this Order shall apply to all Federal and Federally-assisted construction contracts for projects the estimated total cost of which exceeds $500,000, in the Philadelphia area, including Bucks,

Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania.

3. Policy

In order to promote the full realization of equal employment opportunity on Federally-assisted projects, it is the policy of the Office of Federal Contract Compliance that no contracts or subcontracts shall be awarded for Federal and Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids, in trades utilizing the following classifications of employees:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

4. Findings

Enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades. Contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construc-

tion craft unions as their prime or sole source of their labor. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in these classifications are referred to the jobs by the unions. Because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. These exclusionary practices include: (1) failure to admit Negroes into membership and into apprenticeship programs. At the end of 1967, less than one-half of one percent of the membership of the unions representing employees in these seven trades were Negro, although the population in the Philadelphia area during the past several decades included substantial numbers of Negroes. As of April 1965, the Commission on Human Relations in Philadelphia found that unions in five trades (plumbers, steamfitters, electrical workers, sheet metal workers and roofers) were "discriminatory" in their admission practices. In a report by the Philadelphia Local AFL-CIO Human Relations Committee made public

in 1964, virtually no Negro apprentices were found in any of the building trades classes;[1] (2) failure of the unions to refer Negroes for employment, which has resulted in large measure from the priorities in referral granted to union members and to persons who had work experience under union contracts.

On November 30, 1967, the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan. The Federal Executive Board found that[2] the problem of compliance with the requirements of Executive Order 11246 was most apparent in Philadelphia in eight construction trades: electrical, sheetmetal, plumbing and pipefitting, steamfitting, roofing and waterproofing, structural iron work, elevator construction and operating engineers; and that local unions representing employees in these trades in the Philadelphia area had few minority group members and that few minority group persons had been accepted in apprenticeship programs. In order to assure equal employment opportunity on Federal and Federally-assisted construction in the Philadelphia area, the plan required that each apparent low bidder, to qualify for a construction contract or subcontract, must submit a written affirmative action program which would have the results of as-

[1] Marshall and Briggs, *Negro Participation in Apprenticeship Programs* (Dec. 1966), p. 91.

[2] These findings were based on a detailed examination of available facts relating to building trades unions, area construction volume and demographic data.

suring that there will be minority group representation in these trades.

Since the Philadelphia Plan was put into effect, some progress has been made. Several groups of contractors and Local 543 of the International Union of Operating Engineers have developed an area program of affirmative action which has been approved by OFCC in lieu of other compliance procedures, but subject to periodic evaluation. The original Plan was suspended because of an Opinion by the Comptroller General that it violated the principles of competitive bidding.

Equal employment opportunity in these trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.

In view of the foregoing, and in order to implement the affirmative action obligations imposed by the equal employment opportunity clause in Executive Order 11246, and in order to assure that the requirements of this Order conform to the principles of competitive bidding, as construed by the Comptroller General of the United States, the Office of

Federal Contract Compliance finds that it is necessary that this Order, requiring bidders to commit themselves to specific goals of minority manpower utilization, be issued.

5. Acceptability of affirmative action programs

A bidder's affirmative action program will be acceptable if the specific goals set by the bidder meet the definite standards determined in accordance with Section 6 below. Such goals shall be applicable to each of the designated trades to be used in the performance of the contract whether or not the work is to be subcontracted. However, participation in a multi-employer program approved by OFCC shall be acceptable in lieu of a goal for the trade involved in such training program. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract.

6. Specific goals and definite standards

a. *General.*—The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agencies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds $500,000. Such definite standards shall specify the range of minority manpower utilization expected for each of the designated trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids unless the bidder participates in an affirmative action program approved by OFCC.

b. *Specific Goals.*—(1) The setting of goals by contractors to provide equal employment opportunity is required by Section 60-1.40 of the Regulations of this Office (41 CFR § 60-1.40). Further, such voluntary organizations of businessmen as Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions. (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

(2) The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligation and is not intended and shall not be used to discriminate against any qualified applicant or employee.

c. *Factors Used in Determining Definite Standards.*—A determination of the definite standard of the range of minority manpower utilization shall be made for each better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should

result from an effective affirmative action program, the factors to be considered will include, among others, the following:

(1) The current extent of minority group participation in the trade.

(2) The availability of minority group persons for employment in such trade.

(3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(4) The impact of the program upon the existing labor force.

* * * * *

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY,
Washington, D.C., September 23, 1969.

ORDER

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, John L. Wilks, Director, Office of Federal Contract Compliance.

Subject: Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

1. Purpose

The purpose of this Order is to implement Section 6 of the Order issued on June 27, 1969 by Assistant Secretary of Labor Arthur A. Fletcher to the Heads of Agencies outlining a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction." Section 6 of the June 27 Order provides for the determination of definite standards in terms of ranges of minority manpower utilization. This Order also affirms and in certain respects amends the Order of June 27.

2. Background

The June 27 Order requires a bidder on Federal or Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 to submit an acceptable affirmative action program which shall include specific goals of minority manpower utilization within the ranges to be established by the Deparment of Labor, in cooperation with the Federal contracting and administering agencies in the Philadelphia Area, within the following 7 listed classifications:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

Since that time the Department has determined that minority craftsmen may be adequately represented in the classification and title "roofers and water proofers". For this reason, such classification is hereby temporarily excepted from the provisions of the "Revised Philadelphia Plan," subject to further examination of that trade.

Pursuant to a notice of hearing issued on August 16, 1969, representatives of the Department of Labor conducted a public hearing in Philadelphia on August 26, 27, and 28, 1969 for the purpose of obtaining information and data relevant to the establishment of ranges for the purposes of effectuating the above-

referred to June 27, 1969 Order. Section 6 of such Order provides that the following factors among others, will be used in establishing these ranges:

(*a*) The current extent of minority group participation in the trade.

(*b*) The availability of minority group persons for employment in such trade.

(*c*) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(*d*) The impact of the program upon the existing labor force.

Having reviewed the record of that hearing and additional relevant data gathered and complied by the Department of Labor, the following findings and Order are made as contemplated by the Order of June 27, 1969.

3. Findings

(a) Minority Participation in the Specified Trades

The over-all construction industry in the five county Philadelphia area has a current minority representation of employees of 30%. Comparable skilled trades, excluding laborers, have a minority representation of approximately 12%. The construction trades in the Philadelphia area have grown and developed under similar conditions concerning manpower availability and under identical economic and cultural circumstances. Despite that fact, there are few minorities in the above-designated six trades.

The evidence adduced at the public hearing indicates that the minority participation in such trades is approximately 1%. In the June 27 Order, it was found that such a low rate of participation is due to the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trades. The most reliable data available relates to minority participation in membership in the unions representing employees in the six trades. That data reveals the following:

(1) *Iron Workers.*—The total union membership in this craft in the Philadelphia area in 1969 is 850, 12 of whom (1.4%) are minority group representatives.

(2) *Steamfitters.*—Total union membership in the Philadelphia area in 1969 stands at 2,308, 13 of whom (.65%) are minority group representatives.

(3) *Sheetmetal Workers.*—Total union membership in the Philadelphia area in 1969 stands at 1,688, 17 of whom (1%) are minority group representatives.

(4) *Electricians.*—Total union membership in the Philadelphia area in 1969 stands at 2,274, 40 of whom (1.76%) are minority group representatives.

(5) *Elevator construction workers.*—Total union membership in the Philadelphia area in 1969 stands at 562, 3 of whom (.54%) are minority group representatives.

(6) *Plumbers & Pipefitters.*—Total union membership in the Philadelphia area in 1969 stands at 2,335, 12 of whom (.51%) are minority group representatives.

Based upon these figures it is found and determined that the present minority participation in the six named trades is far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

(*b*) *Availability of Minority Group Persons for Employment*

The nonwhite unemployment rate in the Philadelphia area is approximately twice that for the labor force as a whole and the total number of nonwhite persons unemployed is approximately 21,000. There is also a substantial number of persons in the nonwhite labor force who are underemployed. Testimony adduced at the hearing indicates that there are between 1,200 and 1,400 minority craftsmen presently available for employment in the construction trades who have been trained and/or had previous work experience in the trades. In addition it was revealed at the hearing that there is a pool of 7,500 minority persons in the Laborers Union who are working side by side with journeymen in the performance of their crafts in the construction industry. Many of these

persons are working as helpers to the journeymen in the designated trades. Also, testimony at the hearings established that between 5,000 and 8,000 prospective minority craftsmen would be prepared to accept training in the construction crafts within a year's time if they would be assured that jobs were available to them upon completion of such training.

Surveys conducted by agencies of the U.S. Department of Labor have provided additional information relative to the availability of minority group persons for employment in the designated trades.

Based upon the number of minority group persons employed in the designated trades for all industries (construction and non-construction) and those minority group persons who are unemployed but qualified for employment in the designated trades, a survey by the Manpower Administration indicated that minority group persons are now in the area labor market as follows:

Identification of trades	*Number available*
Ironworkers	302
Plumbers, pipefitters and steamfitters	797
Sheetmetal workers	250
Electrical workers	745

A survey by the Office of Federal Contract Compliance indicated that the following number of minority persons are working in the designated trades and those who will be trained by 1970 by major Philadelphia recruitment and training agencies and those

working in related occupations in non-construction industries who would be qualified for employment in the designated trades with some orientation or minimal training:

Identification of trades	*Number available*
Ironworkers	75
Plumbers, pipefitters	500
Steamfitters	300
Sheetmetal workers	375
Electrical workers	525
Elevator constructors	43

Based upon this information it is found that a substantial number of minority persons are presently available for productive employment.

(c) *The Need for Training*

Testimony at the public hearing revealed that there is a need for training programs for willing minority group persons at various levels of skill. Such training must necessarily range from pre-apprenticeship training programs through programs providing incidental training for skilled craftsmen who are near the brink of full journeyman status.* As discussed above, between 5,000 and 8,000 minority group persons are in a position to be recruited for such training within a year's time.

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* Testimony adduced at the hearings indicates that the traditional duration of training to develop competent workmen in the crafts may be longer than necessary to successfully perform substantial amounts of craft level work.

Testimony at the public hearings revealed the existence of several training programs which have operated successfully to train a number of craftsmen many of whom are now prepared to enter the trades in the construction industry. In order to further assure the availability of necessary training programs, the Manpower Administration of this Department has committed substantial funds for the development of additional apprenticeship outreach programs and journeyman training programs in the Philadelphia area. It plans to double the present apprenticeship outreach program with the Negro Union Leadership Council in Philadelphia. Presently, this program is funded for $78,000 to train seventy persons. An additional $80,000 is being set aside to expand this program. In addition, immediate exploration of the feasibility of a journeyman-training program for approximately 180 trainees will be undertaken. Both these programs will be directed specifically to the designated trades.*

(d) *The Impact of the Program Upon the Existing Labor Force*

A national survey of the Bureau of Labor Statistics indicates that the present annual attrition rate of construction trade membership due to retirement is 2.5% per year based upon a total work-

* Memorandum from Arnold R. Weber, Assistant Secretary for Manpower to Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated September 18, 1969.

ing life of 44 years per employee in each of the above-designated trades.

Based on national actuarial rates for the construction industry published by the National Safety Council, the average disability occurrence rate resulting from death or injury is 1% per year. A conservative estimate of the average rate at which employees leave construction crafts for all reasons other than death, disability and retirement is 4% per year.

Therefore, each construction craft should have approximately 7.5% new job openings each year without any growth in the craft. The annual growth in the number of employees in each craft designated under this "Revised Philadelphia Plan" has been and is projected to be as follows:

(1) *Iron Workers.*—The average annual growth rate since 1963 has been approximately 10%. It is projected that an average growth rate in employment will be 3.69% in the near future.*

(2) *Plumbers and Pipefitters.*—The average annal growth rate since 1963 has been approximately 7.38%. It is projected that an average annual growth rate in employment will be 2.9% in the near future.

(3) *Steamfitters.*—The average annual growth rate since 1963 has been approximately 2.63% and

* Projections of the annual growth rate in employment in the designated trades is based on a study by the Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Employment Security, entitled *1960 Census and 1970, 1975 Projected Total Employment.*

is projected to be approximately 2.5% for each of the next four years.

(4) *Sheetmetal workers.*—The average annual growth rate since 1963 has been approximately 2.06% and is projected to be approximately 2.0% for each of the next four years.

(5) *Electricians.*—The average annual growth rate since 1963 has been approximately 4.98%. It is projected that an average annual growth rate in employment will be 2.2% in the near future.

(6) *Elevator Construction Workers.*—The average annual growth rate since 1963 has been approximately 2.41% and is projected to be approximately 2.1% for each of the next four years.

Adding the rate of jobs becoming vacant to attrition to the rate of new jobs due to growth, the total rate of new jobs projected for each craft is as follows:

Identification of trade	*Annual vacancy rate (percent)*
Ironworkers	11.2
Plumbers and pipefitters	10.4
Steamfitters	10
Sheetmetal workers	9.5
Electrical workers	9.7
Elevator construction workers	9.6

Therefore, it is found and determined that a contractor could commit to minority hiring up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force.

(*e*) *Timetable*

In an effort to provide practical ranges which can be met by employers in hiring productive trained minority craftsmen, this Order should be developed to cover an extensive period of time.

The average length of Federally-involved construction projects in the Area is between 2 and 4 years. Testimony at the hearing indicated that a 4 year duration for the "Plan" is proper.

Therefore, it is found and determined that in order for this Order to effect equal employment to the fullest extent, the standards of minority manpower utilization should be determined for the next four years.

(*f*) *Conclusion of Findings*

It is found that present minority participation in the designated trades is far below that which should have reasonably resulted from participation in the past without regard for race, color, or national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

It is found that a significant number of minority group persons is presently available for employment as journeymen, apprentices, or other trainees.

It is found that there is a need for training programs for willing minority group persons at various levels of skills. There exist several training programs in the Philadelphia area which have operated successfully to train craftsmen prepared to enter the

construction industry and, in addition, the Manpower Administration of this Department has committed substantial funds for the development of other apprenticeship outreach programs and journeyman training programs in the Philadelphia area.

Finally, it is found that a contractor could commit himself to hiring minority group persons up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force in the designated trades.

Based upon these findings, a range shall be established by this Order which shall require contractors to establish employment goals between a low range-figure which could result in approximately 20% of the work force in each designated trade being minority craftsmen at the end of the fourth year covered by this Order.*

In addition, training and trainable minority persons are or shall be available in numbers sufficient to fill the number of jobs covered by these ranges, there being 1200 to 1400 minority persons who have had training and 5000 to 8000 prepared to accept training within a year.

Such minority representation can be accomplished without adversely affecting the present work force.

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* Assuming the same proportion of minorities are employed on private construction projects as Federally-involved projects, the lower range should result in 2,000 minority craftsmen being employed in the construction industry in the Philadelphia area by the end of the fourth year.

Based upon the projected Annual Vacancy Rate, the lower range figure may be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each non-minority craftsman.*

4. Order

Therefore, after full consideration and in light of the foregoing, be it *Ordered*: That the Order of June 27, 1969 entitled "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction" is hereby implemented, affirmed, and in certain respects amended, this Order to continue a supplement thereto as required and contemplated by said Order of June 27, 1969.

Further ordered: That the following ranges are hereby established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the next four years:

Identification of trade	*Range of minority groups employment until December 31, 1970*
Ironworkers	5 percent to 9 percent.[1]
Plumbers and pipefitters	5 percent to 8 percent.
Steamfitters	5 percent to 8 percent.
Sheetmetal workers	4 percent to 8 percent.
Electrical workers	4 percent to 8 percent.
Elevator construction workers	4 percent to 8 percent.

[1] The percentage figures have been rounded.

---

* The one for one ratio in hiring has been judicially recognized as a reasonable, if not mandatory, requirement to remedy past exclusionary practices. *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1967).

Identification of trade	*Range of minority groups employment for calendar year 1971* [2]
Ironworkers	11 percent to 15 percent.
Plumbers and pipefitters	10 percent to 14 percent.
Steamfitters	11 percent to 15 percent.
Sheetmetal workers	9 percent to 13 percent.
Electrical workers	9 percent to 13 percent.
Elevator construction workers	9 percent to 13 percent.

[2] After December 31, 1970 the standards set forth herein shall be reviewed to determine whether the projections on which these ranges are based adequately reflect the construction labor market situation at that time. Reductions or other significant fluctuations in federally involved construction shall be specifically reviewed from time-to-time as to their effect upon the practicality of the standards. In no event, however, shall the standards be increased for contracts after bids have been received.

Identification of trade	*Range of minority groups employment for the calendar year 1972*
Ironworkers	16 percent to 20 percent.
Plumbers and pipefitters	15 percent to 19 percent.
Steamfitters	15 percent to 19 percent.
Sheetmetal workers	14 percent to 18 percent.
Electrical workers	14 percent to 18 percent.
Elevator construction workers	14 percent to 18 percent.

Identification of trade	*Range of minority groups employment for the calendar year 1973*
Ironworkers	22 percent to 26 percent.
Plumbers and pipefitters	20 percent to 24 percent.
Steamfitters	20 percent to 24 percent.
Sheetmetal workers	19 percent to 23 percent.
Electrical workers	19 percent to 23 percent.
Elevator construction workers	19 percent to 23 percent.

* * * * *

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AFFIRMATIVE ACTION GUIDELINES

* * * * *

1608.3 Circumstances Under Which Voluntary Affirmative Action Is Appropriate

(a) *Adverse Effect*

Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of Prior Discriminatory Practices*

Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited Labor Pool*

Because of historic restrictions by employers, labor organizations, and others, there are circumstances in

which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(i) training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(ii) extensive and focused recruiting activity;

(iii) elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 F.R. 38,290; 38,297; 38,299 (August 25, 1978));

(iv) modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

1608.4 ESTABLISHING AFFIRMATIVE ACTION PLANS

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable Self Analysis*

The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 C.F.R. Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable Basis*

If the self analysis shows that one or more employment practices: (1) have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been

artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action.

(c) *Reasonable Action*

The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and time-tables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of Appropriate Affirmative Action*

Affirmative action plans or programs may include, but are not limited to, those described in the

Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 F.R. 38,814 (September 24, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 F.R. 38,290, 38,300, 38,308-38,309 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have . . . exclusionary effect . . ., it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:
>
> > The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
> >
> > A recruitment program designed to attract qualified members of the group in question;
> >
> > A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of Reasonable Action*

In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(A) The plan should be tailored to solve the problems which were identified in the self analysis, see 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole.

The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(B) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

* * * * *

APPENDIX C

AFFIRMATIVE ACTION PROGRAMS FOR STATE AND LOCAL GOVERNMENT AGENCIES

POLICY STATEMENT

The Equal Employment Opportunity Coordinating Council was established by Act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

1. Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important, are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local government to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic "conscious," include, but are not limited to, the following:

The establishment of a long term goal, and short range, interim goals and timetables for the specific

job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge, or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and,

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

4. The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such

plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the uneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goals of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done, this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

APPENDIX D

MEMORANDUM—PERMISSIBLE GOALS AND TIMETABLES IN STATE AND LOCAL GOVERNMENT EMPLOYMENT PRACTICES

This Administration has, since September 1969, recognized that goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs. On the other hand, the concepts of quotas and preferential treatment based on race, color, national origin, religion and sex are contrary to the principles of our laws, and have been expressly rejected by this Administration.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, conferred on the Justice Department and the Equal Employment Opportunity Commission enforcement responsibilities for eliminating discriminatory employment practices based upon race, color, national origin, religion, and sex by state and local government employers as set forth in that Act. In addition, under the Intergovernmental Personnel Act and the merit standards statutes, the Civil Service Commission has an obligation to attempt to move state and local governments toward personnel practices which operate on a merit basis. The Department of Labor and other Executive Branch agencies have responsibilities in the area of equal employment opportunities as it affects state and local government

employers. This memorandum addresses the question of how the agencies in the Executive Branch (e.g., CSC, EEOC, Justice, Labor and other Federal agencies having equal employment opportunity responsibilities) should act to implement the distinction between proper goals and timetables on the one hand, and impermissible quotas and preferences on the other, with due regard for the merit selection principles which many states and local governments are obliged to follow, and which some state and local government employers do not properly follow with regard to equal employment opportunities.

All of the agencies agree that there is no conflict between a true merit selection system and equal employment opportunities laws—because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, not on the basis of race, color, national origin, religion or sex. The problems arise when an employer pays only lip service to the concept of merit selection, but in fact follows employment practices which discriminate on the basis of race, color, etc.

All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination. All agencies recognize that where an individual person has been found to be the victim of an unlawful employment practice as defined in the Act he or she should be given "priority consideration" for the next expected vacancy, regardless of his relative "ability ranking"

at the time the new hire is made—this because absent the act of discrimination, he or she would be on the job. All agencies also recognize that it may be appropriate for a court to order an employer to make a good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found.

All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other. Quota systems in the past have been used in other contexts as a quantified limitation, the purpose of which is exclusion, but this is not its sole definition. A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.

Any system which requires that considerations of relative abilities and qualifications be subordinated

to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible under the standards set forth herein.

A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.

Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less

qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.

In some job classifications, in which the newly hired person learns on the job the skills required, and where there is no extensive education, experience or training required as prerequisite to successful job performance, many applicants will possess the necessary basic qualifications to perform the job. While determinations of relative ability should be made to accord with required merit principles, where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the goal, he has the obligation to justify his failure.

Similarly, where an employer has purported to follow merit principles, but has utilized selection procedures which are in fact discriminatory and have

not been shown validly to measure or to predict job success (see, *Griggs* v. *Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424), there frequently is no valid basis presently available for ranking applicants objectively in order of the probabilities of success on the job. In such circumstances, all agencies agree that a public employer will be expected to devise or borrow a selection procedure which is as objective as possible and is likely to be proved valid and is not likely to perpetuate the effects of past discrimination; and to meet those goals which have been set on a vacancy basis. The selection procedure should be as objective and job related as possible, but until it has been shown to be valid for that specific purpose, it must be recognized that rank ordering does not necessarily indicate who will in fact do better on the job. Accordingly, if the goal is not being met because of the interim selection procedure, the procedure and other aspects of the affirmative action program may have to be revised. All agencies agree that use of such goals does not and should not require an employer to select on the basis of race, national origin, or sex a less qualified person over a person who is better qualified by objective and valid procedures. Where such procedures are not being utilized, valid selection procedures to determine who will in fact do better on the job should be established as soon as feasible in accordance with the principles set forth in paragraphs 2 and 5 below.

With the foregoing in mind, the agencies agree that the following principles should be followed:

1. Whenever it is appropriate to establish goals, the goals and timetables should take into account anticipated vacancies and the availability of skills in the market place from which employees should be drawn. In addition, where unlawful discrimination by the employer has been established, the corrective action program, including the recruiting and advertising obligations and the short range hiring goals, should also take into account the need to correct the present effects of the employer's past discriminatory practices.

2. The goals should be reached through such recruiting and advertising efforts as are necessary and appropriate, and the selection of persons only from amongst those who are qualified. A goal, unlike a quota, does not require the hiring of persons when there are no vacancies, nor does it require the hiring of a person who is less likely to do well on the job ("less qualified") over a person more likely to do well on the job ("better qualified"), under valid selection procedures. When the standards for determining qualifications are invalid and not predictive of job success, valid selection procedures should be developed as soon as feasible. Where an employer has followed exclusionary practices, however, and has made little or no progress in eliminating the effects of its past discriminatory practices, the selection standards its proposes to utilize in determining who is "qualified," or "better qualified" will be examined with care to assure that they are in fact valid

for such purposes and do not perpetuate the effects of the employer's past discrimination (i.e., which have as little discriminatory impact as possible under the circumstances) and do not raise artificial or unnecessary barriers.

3. In no event does a goal require that an employer must in all circumstances hire a specified number of persons, because such a goal would in fact be a quota. It is, however, appropriate to ask a court to impose goals and timetables, including hiring goals, on an employer who has engaged in racial or ethnic exclusion, or other unconstitutional or unlawful employment practices. The goals we seek in court, like those accepted voluntarily by employers, are subject to the limitations set forth in this memorandum.

4. As a general matter, relief should be provided to those persons who have been adversely affected as a consequence of the employer's unlawfully discriminatory practices. All agencies will continue to seek insofar as feasible to have persons who can show that they were injured by such practices restored to the position they would be in but for the unlawful conduct. In addition, all agencies will seek to have those persons who have been excluded from consideration or employment because of such discriminatory practices allowed to compete for future vacancies on the basis of qualifications and standards no more severe than those utilized by the employer in selecting from the advantaged groups, unless the increased standards are required by business necessity. Such relief will be sought to prevent the erection of un-

necessary barriers to equal employment opportunities. Such relief will not preclude a public employer from adopting merit standards; nor will it preclude such an employer who has previously used invalid selection standards or procedures from developing and using valid, job related selection standards and procedures as contemplated by paragraphs 2 and 5 of this memorandum.

5. Where an employer has utilized a selection device which is itself unlawfully discriminatory, relief should be sought to prohibit the use of that and similar selection devices (i.e., devices which measure the same kinds of things) together with the development of an appropriate affirmative action plan which may include goals and timetables in accord with the principles set forth in this paper. In addition, we will ask the courts to permit the employer to select (or develop) and validate a job related selection procedure which will facilitate selections on the basis of relative ability to do the job. The speed with which such new selection devices can and should be developed and validated depends upon the facts and circumstances of each case.

Agencies with equal employment opportunity responsibilities should take actions in accordance with the principles outlined in this memorandum in order to assure a coordinated approach within the Executive Branch to eliminate discriminatory employment practices and their consequences.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286216 306

Nos. 78-432, 78-435, 78-436

Supreme Court, U.S.
FILED
FEB 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL
CORPORATION, AND UNITED STATES OF AMERICA,
RESPONDENTS

KAISER ALUMINUM & CHEMICAL
CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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Section 703(d), 42 U.S.C. §2000e-2(d) (1976) 34,75,77,82

Section 703(h), 42 U.S.C. §2000e-2(h) (1976) 48

Section 703(j), 42 U.S.C. §2000e-2(j) (1976) ..39,78

Section 713(b), 42 U.S.C. §2000e-12(b) (1976) 26

Section 713(b)(1), 42 U.S.C. §2000e-12(b)(1) (1976) 26

42 U.S.C. §1981 (1976) 2,23,46

29 C.F.R. Part 1608 (1979) 25

TABLE OF AUTHORITIES (Continued)

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29 C.F.R. §1608.1 (1979) 25

29 C.F.R. §1608.2 (1979) 25

29 C.F.R. §1608.3 (1979) 26

29 C.F.R. §1608.4 (1979) 84

29 C.F.R. §1608.4(a) (1979) 27

29 C.F.R. §1608.4(b) (1979) 26,59

29 C.F.R. §1608.4(c) (1979) 28

29 C.F.R. §1608.5 (1979) 28

41 C.F.R. Part 60.2 (1978) 27,84

41 C.F.R. §60-2.11 (1978) 80

41 C.F.R. §60.2.11(b) (1978) 27

41 C.F.R. §60-2.12 (1978) 27

Miscellaneous:

110 Cong. Rec. (1964):

p. 6549 40,74

p. 7213 78

p. 7218 39

p. 8921 40,78

p. 11847 40

p. 12723 78

117 Cong. Rec. (1971):

p. 31963 42,43

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p. 31964 43

p. 31965 43

124 Cong. Rec. (daily ed., June 13, 1978):

p. H5371 45

p. H5379 45

The Challenge Ahead, Equal Opportunity in Referral Unions (U.S. Comm'n. on Civ. Rts., May, 1976) 65

EEOC Decision No. 74-106 (1974), CCH Employment Practices Guide ¶ 6427 82

EEOC Decision No. 75-268 (1975), CCH Employment Practices Guide ¶ 6452 (1975) 82

Executive Order 11246, Subpart D, §209 .. 27,59,79

The National Apprenticeship Program (U.S. Dept. of Labor, Employment and Training Admin., Rev., 1976) 7,67

Note, *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109 (1971) 86

Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978) 45

Supplementary Information, Guidelines on Affirmative Action, CCH Employment Practices Guide ¶ 4011.11 28,83

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U.S. Bureau of the Census, 1970 Census of Population; Vol. 1: Characteristics of the Population:

Part 20, Louisiana, Appendix B, App. 40 62

Part 20, Louisiana, Table 172 62,66

Part 40, Philadelphia, Pa.-N.J., SMSA, Table 172 64

Nos. 78-432, 78-435, 78-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM &
CHEMICAL CORPORATION, AND UNITED
STATES OF AMERICA, RESPONDENTS

KAISER ALUMINUM & CHEMICAL
CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICA AND EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

May an employer and labor union, solely in order to achieve a desired ratio of minority workers in craft positions at a manufacturing plant and in the absence of any prior discrimination against the minority workers at that plant, institute a racial quota for admission to craft training programs that is preferential to members of minority groups and discriminates against whites, where job seniority would ordinarily determine entry into the training programs?

STATEMENT OF THE CASE

In order to achieve a desired ratio of minority workers in craft jobs at a manufacturing plant in Gramercy, Louisiana, petitioners, Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA"), instituted a racial quota requiring that at least 50 per cent of all applicants selected into craft training programs be members of minority groups. Brian F. Weber and the class of similarly situated white workers at the Gramercy plant brought an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, alleging that the 50 per cent racial quota discriminated against them unlawfully. An injunction was granted in favor of the plaintiffs by the United States District Court for the Eastern District of Louisiana[1] and this decision was af-

1 *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761 (E.D. La., 1976).

firmed by the United States Court of Appeals for the Fifth Circuit.[2]

1. Application of the agreement between Kaiser and USWA.

The racial quota of Kaiser and USWA was instituted as part of the 1974 Labor Agreement executed by the parties. The agreement provided in part that "certain goals and time tables" would be established by a joint committee to facilitate the achievement of a "desired minority ratio" in existing trade, craft and assigned maintenance classifications at various Kaiser plants, including the Gramercy Plant.[3] The percentage "goal" established by the joint committee for the Gramercy Plant was 39 per cent, based on the percentage of minority workers in the available work force in the area.[4] The agreement stated:

> [A]t a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .[5]

2 *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir., 1977).

3 App., 137.

4 App., 60.

5 App., 137.

Kaiser estimates that the 50 per cent quota must exist for at least 30 years in order to reach the 39 per cent goal.[6] If and when the goal is reached, a percentage quota reflecting the percentage of minority workers in the overall labor force will be established for the training programs.[7] This quota is expected to be used indefinitely to assure perpetual "minority representation in the plant that is equal to that representation in the community work force population."[8]

Apart from the racial quota imposed by Kaiser and USWA, the sole qualification for entry into the training programs is the seniority of applicants.[9] This seniority is determined on the basis of "length of employment at the plant and is not affected by departmental or job seniority. All workers at the plant are included in this seniority line."[10]

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6 Brief for Petitioner, Kaiser Aluminum & Chemical Corporation in No. 78-435 (hereinafter cited as "Brief of Kaiser") at 52-53 n.135, Exhibit A.

7 App., 69.

8 App., 69. This statement was made by Dennis E. English, industrial relations superintendent at the Gramercy plant. He also said:

> Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. App., 69.

9 App., 73-74, 127.

10 App., 128.

Respondent, Brian F. Weber, was employed as a lab analyst at the Gramercy works of Kaiser. In April, 1974, company bids for the on-the-job training programs in the instrument repair, general repairman and electrician craft categories were posted by Kaiser.[11] Pursuant to the standard procedure of Kaiser and USWA, applicants were to be selected for those programs on the basis of seniority.[12] However, a condition of the bid was that at least half of the persons selected as prospective trainees would be applicants who were members of minority groups.[13] Thus, applicants for the training programs were selected from racially separated seniority lines. Selection was made one-for-one "on the basis of their seniority, within respective groups of bidders from their race."[14]

Mr. Weber and other white members of the plaintiff class applied for the training programs. However, members of minority groups with less seniority than white employees were selected preferentially by Kaiser for these programs to meet the established quota of at least 50 per cent minority representation.[15] In each instance of selection of a minority applicant, one or more

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11 App., 127.

12 App., 73-74, 127.

13 App., 127.

14 App., 127.

15 App., 127-28. One black trainee and one white trainee were selected for the instrument repair training program, one black trainee and one white trainee were selected for the electrician training program, and three black trainees and two white trainees were selected for the general repairman training program. App., 127-28.

white workers with greater seniority than members of minority groups selected for the training programs were denied entry into the training programs solely on the basis of the racial criterion.[16]

Subsequently, company bids were posted for additional craft training openings in the air conditioning mechanic,[17] insulator and carpenter categories.[18] The selections for these openings were made on the basis of the 50 per cent minority requirement. One of the bids barred applications by any white employee, as the bid was specifically limited to minority employees only.[19] In all, in the period April through October, 1974, seven minority employees were selected for positions in training programs in preference to white employees pursuant to the 50 per cent quota.[20]

2. Desirability of the craft positions.

The craft training programs offered by Kaiser presented significant opportunities to the unskilled workers at the plant. For years, USWA had negotiated

16 App., 127-28.

17 App., 127. This bid was posted on May 7, 1974. A white bidder with senior status was selected for this training program; this selection re-established a 50-50 racial balance in the training programs.

18 App., 127. One black trainee and one white trainee were selected for the carpenter training program and one black trainee was selected for the insulator training program. App., 127-28.

19 App., 46, 128.

20 App., 128.

to obtain the opportunity for its members to obtain craft training.[21] Entry into the training programs would provide the opportunity for a worker to "better [himself] financially"[22] by obtaining better hourly pay and overtime wages.[23] In addition, the benefits associated with being a craftsman are greater than for unskilled jobs, including the opportunity primarily to work the day shift.[24] Mr. Weber and other workers also perceived the craft positions to be desirable to provide job security.[25] Mr. Weber said there is "much more job security as a craftsman than any other job."[26]

The craft jobs available at the Gramercy plant required heavy industrial skills that are acquired only after substantial training and schooling.[27] In the crafts generally in the United States, the necessary skills are acquired only after apprenticeship programs lasting up to five years.[28] Many apprenticeship programs are registered with state apprenticeship councils or the Bureau of Apprenticeship and Training of the Department of Labor.[29] These programs must identify certain

21 App., 64, 85.

22 App., 33.

23 App., 33.

24 App., 33.

25 App., 33, 129.

26 App., 33. The parties stipulated that craft jobs "are considered desirable and advantageous for financial, job security and other reasons." App., 129.

27 App., 67.

28 See, e.g., The National Apprenticeship Program (U.S. Dept. of Labor, Employment and Training Admin., Rev. 1976).

29 *Id.* at 4.

minimum standards to be met, including a guarantee of equal opportunity, work processes to be used in on-the-job training, planned related instruction, proper evaluation and supervision, and a "term of apprenticeship that is consistent with training requirements as established by industry practice . . . ."[30]

The craft positions at the Gramercy plant required special skills necessary for the performance of duties in the heavy industrial setting.[31] The electrical circuitry carrying high voltages, potentially dangerous industrial chemicals, large and complex industrial equipment and machinery, and sensitive meters and indicators require specialized knowledge and training to adequately and safely perform the necessary tasks.[32] In the training programs at issue in this case, Kaiser provides two and one-half to three and one-half years of on-the-job heavy industrial training and about "four hours of schooling per week by a training supervisor."[33] In addition, the company requires each trainee to take and pass from 40 to 66 home courses provided

30 *Id.* at 5.

31 As a result, Kaiser required prior heavy industrial experience for new hires. App., 70.

32 Kaiser maintains job descriptions for each of its craft positions. A sample "primary function" is that of the instrument repairer:

> To layout wiring, inspect, install, test, repair, service, maintain, and wire plant indicating and recording, instruments, meters, high voltage protective devices, gauges, relays, thermometers and pyrometric equipment.

33 App., 67.

by the International Correspondence School.[34] Thus, the training programs provide a concentrated course of study and training for employment in the industrial crafts.

3. Impact on the white workers.

The effect of the racial quota instituted by Kaiser and USWA was to create separate black and white seniority lines for entry into the training programs. As stated by Dennis E. English, industrial relations superintendent at the Gramercy plant, "in effect [separate seniority lines are created] because you skip the whites to get the blacks, if necessary."[35] In many cases, black bidders were selected despite substantially greater seniority held by white bidders. One white employee who testified that he was denied entry into the training programs, Fortune H. Maurin,[36] possessed more than 16 years seniority at the time of the trial.[37]

The effect of the 50 per cent quota was to alter the traditional criterion, seniority, for entry into the craft training programs.[38] Because proportionately more white workers than minority workers are employed at the Gramercy plant and have obtained senior status, a

34 App., 67.

35 App., 75.

36 Mr. Maurin's name is incorrectly spelled "Moran" in the trial transcript, but appears correctly as F. H. Maurin in the exhibits. App., 54-59, 156-64.

37 App., 54.

38 App., 101.

50-50 racial quota deprives whites of their seniority rights.[39] Thomas M. Bowdle,[40] director of equal opportunity affairs of Kaiser, conceded this point. He said:

> Q. So, you recognized that when you waive the number one requirement, the seniority requirement, and you take a black with less seniority than a white, you're thereby favoring the black on grounds of race, is that right?
>
> A. He's getting preferential treatment, that's correct.[41]

Mr. Bowdle also conceded that "the black is being selected for a program primarily on the basis of his race."[42]

The racial quota instituted by Kaiser and USWA, and the perceived effect of race discrimination, had a substantial impact on the white workers of the plant. A "sacred"[43] and objective criterion for advancement and opportunity, seniority, was devalued by the factor of race.[44] Mr. Bowdle stated that there is "no question" that the racial quota "gives . . . minorities, special seniority rights, at the expense of white workers hired

39 App., 75, 101-02.
40 Mr. Bowdle's name is incorrectly spelled "Bouble" in the transcript.
41 App., 101-02.
42 App., 102.
43 App., 99.
44 App., 99, 102.

earlier."[45] In addition, Mr. Weber indicated that the racial quota had a significant impact on white workers and resulted in adverse consequences.[46] Mr. Weber had "been involved with the Union for several years as a trustee [and] as a grievance committee man"[47] and was "presently chairman of the grievance committee."[48] His responsibilities included dealing "with all the hourly people on the plant site . . . with their problems in regard to any contractual violations or other problems they might have."[49] His familiarity with the attitudes of the hourly employees was not challenged.

Mr. Weber stated that "the quota system used by the company has had a very bad effect on the white workers at the plant."[50] One negative impact of the 50 per cent quota was a deterioration in racial harmony. Mr. Weber stated:

> [T]he racial relations of the white worker toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves.[51]

45 App., 105.
46 App., 36.
47 App., 35.
48 App., 35.
49 App., 35.
50 App., 36.
51 App., 36.

Mr. Weber also stated that "the [white] employees feel that the company and the Union are working against them, not for them, in advancement and promotions to jobs that they might better themselves. They feel that they're being held back."[52] He indicated that the racial quota substantially diminishes the loyalty of white workers to Kaiser and USWA and their desire to be productive. He said:

> [I]t takes away from the initiative of the individual employee to do more, to do one step further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company.[53]

4. Reasons for the adoption of the racial quota.

The primary reason for the adoption of the 50 per cent quota for selection into the craft training programs was the small percentage of minority workers in craft jobs as compared with the minority labor force as a whole.[54] Prior to the institution of the training programs under the 1974 agreement, only about two per cent of the craftsmen at the Gramercy plant were minority employees.[55] According to Mr.

52 App., 36.
53 App., 37-38.
54 App., 62-64, 137.
55 App., 62, 167.

English, Kaiser and USWA were "striving to obtain . . . a 39 per cent minority population in each of the craft families . . . ."[56] The one-for-one hiring program was the means adopted to achieve this goal.

Kaiser was motivated to adopt the 50 per cent quota in part because of its perception of the wishes of federal contract compliance officers.[57] However, Kaiser was not ordered to implement this action.[58] Kaiser had a substantial economic reason to comply with federal contract compliance suggestions.[59] In addition, Kaiser believed that it was furthering a national social policy by the adoption of the racial quota.[60]

USWA appears to have concurred in the adoption of the racial quota as an affirmative action measure.[61] However, USWA had negotiated for years for the institution of training programs to provide its members with access to craft jobs.[62] In the words of the attorney for USWA, "the Union's efforts were directed towards obtaining additional opportunities for their members,

56 App., 60.
57 App., 83, 92-93.
58 App., 84.
59 App., 77.
60 App., 95. The district court indicated that the racial quota was also adopted to avoid "vexatious litigation," but there was no evidence that any black employees had threatened suit based on the makeup of craft positions at the Gramercy plant. 415 F.Supp. at 765. The agreement was adopted for a number of plants, some of which may or may not have been potential litigation targets.
61 See Petition for a Writ of Certiorari filed on behalf of USWA in this Court, No. 78-432.
62 App., 73.

who were also Kaiser employees, as opposed to creating opportunities for people from the street."[63] Thus, the training programs were instituted to benefit union members, and were not solely an affirmative action measure having incidental benefits for white as well as black workers.

The racial quota was not implemented by Kaiser and USWA to remedy past discrimination, but instead was designed to help uplift the employment status of minority workers as a class.[64] The program was part of a national plan to compensate for the unavailability of minority craftsmen of the type employed by Kaiser.[65] As stated by USWA in its brief,[66] "[t]he program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant."[67] Kaiser believed that it had not discriminated against minority workers at the Gramercy plant.[68] Instead, Mr. Bowdle indicated that the racial quota was necessitated by the adverse impact on minorities of general societal discrimination.[69] Mr. Bowdle stated that "past discrimination in the field of education, job training, et cetera, has created the condition that we have to deal with in terms of minority

63 App., 85.
64 Opinion of the district court, 415 F.Supp. at 765.
65 App., 92-94, 99-100.
66 Brief for Petitioner, United Steelworkers of America, AFC-CIO-CLC (hereinafter cited as "Brief of USWA").
67 *Id.* at 5.
68 App., 108, 99.
69 App., 99-100.

craftsmen."[70] These factors, according to Mr. Bowdle, have also led to low minority ratios "for lawyers, for doctors, for engineers."[71]

While Kaiser believed on the basis of the "sum total of our experience"[72] that the class of blacks generally has suffered societal discrimination, no effort was made to identify any individual subjected to societal discrimination.[73] To the extent that the racial quota was designed to rectify past discrimination as well as to achieve a desired statistical ratio, it was based on an assumption concerning minority classes rather than any evidence as to individuals.[74] Indeed, Mr. Bowdle indicated that some blacks may not have suffered societal discrimination, while some whites may have endured this hardship.[75] In this case, the whites whose seniority rights were diluted under the racial quota were no better off than the preferred blacks in terms of craft-preparedness because "all of the whites who were passed over lacked the skills that the blacks lacked."[76] Kaiser did not believe that any of the individuals preferred under the racial quota were ever subjected to employment discrimination by Kaiser.[77] The 50 per

70 App., 99-100.
71 App., 100.
72 App., 100.
73 App., 100.
74 App., 100.
75 App., 101.
76 App., 101.
77 App., 99.

cent quota was implemented "to increase the representation of minorities [in the crafts] that will approximate the participation in the labor market . . . ."[78]

5. Availability of minority craftsmen.

Although the percentage of minority craftsmen at the Gramercy plant was smaller than the minority representation in the labor force overall, it was not smaller than the percentage of skilled heavy industrial craftsmen in the Gramercy area. The evidence established that "[t]he available supply of trained craft and trade personnel available for hire by the company as new employees has been, and remains to the present time, almost entirely made up of white males."[79] Mr. English said that craftsmen with heavy industrial skills were not available: "Once again, we can advertise all we want, and look as hard as we can look, and they just aren't available."[80] He agreed that there might be "as little as one or two per cent minority craftsmen in St. James and St. John's parrishes (sic)."[81] Mr. Bowdle stated that the availability of skilled craftsmen was "minimal" and, with ordinary minority recruitment measures, Kaiser would "end up baying at the moon, as it were."[82]

78 App., 105.
79 App., 126.
80 App., 63.
81 App., 76.
82 App., 93.

The means adopted by Kaiser to increase the percentage of minority craftsmen at the Gramercy plant were expensive. The minimum cost of the program of on-the-job training, classroom instruction and home study was $15,000 to $20,000 per trainee per year.[83] Had minority craftsmen been available in the work force at large, Kaiser could have increased the ratio of minority craftsmen at the plant without this cost. Mr. Bowdle stated:

> Q. Now, sir, on a pure economic basis, what would be the cheapest procedure, on the pure cost approach, for obtaining qualified craft employees at the various Kaiser plants?
>
> A. Hire them off the street. If we had adequate supply of craftsmen, candidates coming off the street, that would be the logical way for us to fill our craft jobs, rather than train, because training costs money.[84]

Prior to the institution of the racial quota, Kaiser tried a number of affirmative action methods to attract minority craftsmen. The company set goals and timetables to increase the percentage of minorities in the crafts.[85] In addition, it advertised "in minority-only newspapers" and maintained separate craft application files.[86] According to the industrial relations

83 App., 67-68.
84 App., 95.
85 App., 62.
86 App., 62.

superintendent, "any time the craft vacancies comes up, our first thing, we will go to that craft file and we will try to locate qualified black craftsmen, and we always look for the blacks before the whites. . . ."[87] However, the few minority craftsmen in the area were already employed "because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."[88] The quota was instituted because "the officials of both Kaiser and the Steelworkers realized that something other than the ordinary, look until you find them, had to be done to get blacks into the crafts."[89]

6. Absence of prior discrimination.

The seniority criterion for entry into training programs is based on the date of hire at the plant and is applicable to all employees.[90] Promotional decisions at the Gramercy plant were never based on race.[91] Determinations of seniority for selection into training programs are based on "length of employment at the plant."[92] The Gramercy plant of Kaiser was opened in 1957 or 1958 and discrimination against blacks in hiring has never occurred at this plant.[93] Some "very senior black employees that were hired in and started

87 App., 62-63.
88 App., 63.
89 App., 64.
90 App., 72.
91 App., 72-73.
92 App., 128.
93 App., 77-78.

the plant in 1957-58" have obtained "pretty highly paid top jobs in the plant. . . ."[94]

The district court found that the quota adopted by Kaiser and USWA was *not implemented* "with a view toward correcting the effects of prior discrimination."[95] In addition, it found:

> The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on the job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.[96]

In the district court USWA contended that the statistical showing of a low ratio of minority workers in craft jobs was sufficient to make out a case of past discrimination.[97] This contention was rejected by the district court on the basis of all the evidence.[98] The court of appeals upheld this decision, specifically quoting and approving the finding of the district court that the low percentage of minority craftsmen did not establish past

94 App., 71.
95 415 F.Supp. at 765.
96 415 F.Supp. at 764.
97 Post-Trial Brief of Defendant, United Steelworkers of America AFL-CIO.
98 415 F.Supp. at 764.

discrimination.[99] In the court of appeals, USWA argued that certain training programs of Kaiser existing prior to 1974 that required prior experience may have been discriminatory because minorities lacked this experience.[100] However, a disparate impact of the requirement could not be shown[101] and the district court implicitly found the prior experience requirement to be business related.[102] In addition, the court of appeals held these programs "so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period."[103] Thus, both courts found that Kaiser had not discriminated against blacks at the Gramercy plant.

The dissenting judge in the court of appeals, the Hon. John Minor Wisdom, contended that "arguable violations" of Title VII existed, but indicated that "Kaiser did act in good faith [and] made admirable attempts to recruit black craftsmen."[104] In addition, he conceded that "the three potential violations discussed above may not make the district court's finding [of no discrimination] 'clearly erroneous' in the sense contemplated by Rule 52(a), F.R.C.P. . . ."[105]

No party contends that the minority workers preferred under the racial quota are identifiable victims of any past discrimination.

99 415 F.Supp. at 764; 563 F.2d at 224.

100 Prior to the institution of the training programs involving no prior experience requirement in 1974, Kaiser filled its craft positions primarily by hiring fully trained craftsmen from outside the plant. App., 65. However, pursuant to the efforts of USWA to open craft jobs to union members within the plant, Kaiser instituted two partial training programs prior to 1974 in which persons with previous experience were accepted and trained. App., 64-65, 126. The training programs involved acceptance of persons with experience of one year in the carpenter-painter craft from 1964 until 1971, acceptance of applicants with three years experience in the general repairman category from 1968 until 1971, and selection of persons with two years experience in the general repairman craft from 1971 until 1974. App., 126.

In these training programs involving selection of employees with prior experience, it was necessary only for Kaiser to provide training to the employee for the balance of training he did not have. App., 64-65. Thus, the general repairman training program into which employees with three years experience were selected lasted two years; when this program was modified for selection of applicants with two years experience, the training program was lengthened to three years. App., 126. The minimum cost to Kaiser of each year of training, for each trainee, was $15,000 to $20,000. App., 68.

Of 292 craft employees at Kaiser in 1975, only 28 entered through the prior experience training programs. App., 126. These training programs were open to members of minority groups as well as whites with the requisite experience. App., 126. Of the 28 persons who completed the prior experience training programs during their 10 year existence, seven per cent were black. App., 126. This percentage is identical to the ratio of black bidders with no prior experience in the top 28 positions of seniority at the time of the institution of the training programs at issue in this case. App., 156.

101 See n. 100 *supra*.

102 See 563 F.2d at 232 (Wisdom, J., dissenting).

103 *Id.* at 224 n. 13.

104 *Id.* at 232.

105 *Id.* at 232.

7. Procedural background.

This case was filed December 31, 1974 after the issuance of a right-to-sue letter by the New Orleans office of the Equal Employment Opportunity Commission ("EEOC").[106] The national office of the EEOC became aware of the case almost immediately and, prior to the filing of answers by Kaiser and USWA, a request was made by an EEOC staff attorney for copies of the pleadings filed by Mr. Weber.[107] Every important pleading filed by the plaintiffs was sent to this attorney.[108] Copies of the stipulation and six of the seven exhibits were also provided to the EEOC.[109] The EEOC staff attorney discussed the case with counsel for each party.[110] Despite its knowledge of and interest in the case, the EEOC determined not to intervene at the district court level.

The suit of Mr. Weber was filed and certified as a class action.[111] Pursuant to the order of the district court, the Approved Form of Notice was required to be

106 The right-to-sue letter was filed in the district court. Counsel was asked by the district court to investigate the charge and institute suit if appropriate. Thereafter, counsel was formally appointed by the district court to represent Mr. Weber. See App., 4.

107 See Brief for Respondents in Opposition to the Petition for Writs of Certiorari at 5.

108 *Id.* at 5-6.

109 *Id.* The relevant portion of the seventh trial exhibit was contained in the stipulation.

110 App. 30-31.

111 App., 24.

posted "on all employee bulletin boards at the Gramercy, Louisiana works . . . and at the Union Hall [of USWA]."[112] The Approved Form of Notice stated in part that the suit "alleges that the selection policies of the defendants for [on-the-job] training programs, which require the selection of minority applicants to fill at least fifty percent of the available vacancies in the training programs, constitute race discrimination [in violation of Title VII and 42 U.S.C. §1981]."[113]

Although the trial lasted only one day, a large amount of statistical data submitted by Kaiser was stipulated into evidence by the plaintiffs and other facts were also stipulated.[114] A substantial portion of the trial was devoted to reviewing the past employment practices of Kaiser and the reasons for the low percentage of minority craftsmen.[115] The case was under advisement in the district court for more than 14 months.[116] The district court ruled in favor of the plaintiffs, holding that the racial quota violated the

112 App., 25.

113 R., Equal Employment Opportunity in Selection for On-the-Job Training Programs, Approved Form of Notice. Fifth Cir. App., 35. This notice was omitted from the Appendix in this Court.

114 App., 124 *et seq.*

115 See text at nn. 90-105 *supra.*

116 The opinion of the district court was issued June 17, 1976.

rights of white employees under Title VII of the Civil Rights Act of 1964.[117]

The court of appeals affirmed,[118] holding that "[i]t is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race."[119] The court held that while remedial action designed to correct past discrimination by the employer and restore employees to their "rightful place" is permissible under Title VII, racial preferences are not.[120] The court of appeals concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice,

117 415 F.Supp. at 769-70.

118 563 F.2d 216. The Hon. John Minor Wisdom dissented from the decision.

119 563 F.2d at 223.

120 *Id.* at 225.

> and its preference for training minority workers thus violates Title VII.[121]

8. Published posture of the Government.

The United States and the EEOC (collectively referred to as "the Government"), petitioners, support Kaiser and USWA in this case and contend that the racial quota is valid as a "remedy" for "apparent" violations of Title VII.[122] This position is asserted to be consistent with the current posture of the EEOC under its affirmative action guidelines.[123] In light of this contention, a brief review of the published affirmative action posture of the Government is appropriate.

The affirmative action guidelines[124] were published by the EEOC in an effort to insulate employers from liability to white employees for preferences enacted in favor of minority workers under affirmative action programs.[125] The guidelines were assertedly

121 *Id.* at 226. After the decision of the court of appeals, the United States and Equal Employment Opportunity Commission, which had participated at the appellate level as amici curiae, moved for and were granted permission to intervene as parties. The appellants petitioned for rehearing and suggested rehearing en banc. These petitions were under consideration for more than three months, but were denied on April 17, 1978. 571 F.2d 337.

122 Brief for the United States and The Equal Employment Opportunity Commission (hereinafter cited as "Brief of the Government") at 35-42.

123 Brief of the Government at 40-41.

124 29 C.F.R. Part 1608 (1979).

125 29 C.F.R. §§1608.1, 1608.2 (1979).

promulgated pursuant to Section 713(b) of Title VII,[126] which provides that no person shall be subject to liability in "any action or proceeding based on any alleged unlawful employment practice . . . if he pleads and proves that [he acted] in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . ."[127]

The guidelines require a "reasonable basis" for the preferences granted under the affirmative action plan.[128] However, a reasonable basis does not require an apparent or even arguable violation of Title VII.[129] Indeed, "[i]t is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action."[130] The affirmative action is "appropriate" whenever there has been an actual or potential adverse impact on minorities of business practices, when there is a disparity in the minority ratio between the "employer's work force, or a part thereof, and an appropriate segment of the labor force," or when there is limited availability of minority workers in the labor pool.[131]

126 42 U.S.C. §2000e-12(b) (1976).
127 *Id.* §2000e-12(b)(1).
128 29 C.F.R. §1608.4(b).
129 *Id.*
130 *Id.*
131 29 C.F.R. §1608.3 (1979).

The employer is specifically authorized to find a reasonable basis for instituting preferences under the technique set forth in Revised Order No. 4 of the Office of Federal Contract Compliance ("OFCC").[132] This order requires affirmative action whenever "underutilization" is found in any job group.[133] Underutilization means "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."[134] In its utilization analysis, the contractor must consider not only the availability of minorities having the requisite skills in the work force, but also the minority population in the labor area, the size of the minority unemployment force in the labor area, the percentage of the minority work force as compared with the total work force, and other factors.[135]

If underutilization exists, the employer must establishs "goals" that are "specific for planned results" and must meet the goals within designated timetables.[136] A contractor that fails to comply with OFCC requirements may be subjected to loss of its federal contracts, debarment from future federal contracts and other penalties.[137]

The "reasonable action" deemed appropriate under the affirmative action guidelines includes "goals and

132 29 C.F.R. §1608.4(a) (1979); 41 C.F.R. Part 60-2 (1978).
133 41 C.F.R. §60-2.11(b) (1978).
134 *Id.*
135 *Id.*
136 41 C.F.R. §60-2.12.
137 Executive Order 11246, Subpart D, §209.

timetables or other appropriate employment tools which recognize the race, sex or national origin of applicants or employees."[138] Actions adopted in compliance with Revised Order No. 4 will receive the approval and protection of the EEOC guidelines.[139] Preferences may be provided to minority workers or women "regardless of whether the persons benefitted were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination."[140]

The affirmative action guidelines were issued on December 11, 1978, the same day that certiorari was granted in this case. The EEOC denied any conflict between the guidelines and the decision of this Court in *Regents of the University of California v. Bakke*,[141] because in *Bakke* "the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan."[142] The EEOC recognized the conflict between the decision of the Fifth Circuit in this case and the guidelines. Rather than deterring the EEOC from issuing the guidelines, however, the decision of the Fifth Circuit was deemed to make them all

138 29 C.F.R. §1608.4(c).

139 29 C.F.R. §1608.5.

140 29 C.F.R. §1608.4(c).

141 ___ U.S. ___, 98 S.Ct. 2733 (1978).

142 Supplementary Information, Guidelines on Affirmative Action, CCH Employment Practices Guide ¶ 4011.11. The implication of this statement, of course, is that reliance on these or similar guidelines could have changed the decision of the Court in *Bakke*.

the more necessary: "[T]he clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII."[143]

ARGUMENT

Summary of Argument

1. Regardless of the benign and appealing phrases used by the Government, Kaiser and USWA to describe the 50 per cent racial quota,[144] the operation of the quota presents a classic case of race discrimination against whites. The white workers at the Gramercy plant were denied valuable employment opportunities solely on the ground of race. The 50 per cent quota required the selection of minority applicants over white applicants with greater seniority. This selection system in effect created two separate lines of seniority based on race, artificially diluted the seniority rights of white workers, and required the selection of a greater percentage of minority workers for training programs than the percentage of minority workers employed at the plant. Therefore, the 50 per cent quota is an open and intentional policy of discrimination against white workers.

143 *Id.*

144 E.g., Kaiser describes the racial quota as "voluntary race conscious action." Brief of Kaiser at 30. The Government describes the training programs as "race-conscious training programs." Brief of the Government at 36.

2. Employment discrimination against white workers is just as illegal under Title VII as discrimination against minority employees. Title VII was passed by Congress to prohibit all forms of racial bias in employment. The decisions of this Court and the legislative history of the statute establish that racial quotas of any kind are illegal. These authorities are consistent with the constitutional decisions of this Court, which establish that the reverse racial quota implemented by Kaiser and USWA would be unconstitutional if imposed by the Government.

3. The contentions raised in support of the discriminatory racial quota have no merit. No "apparent" past discrimination existed in this case. No effort was made by Kaiser or USWA to identify any past discrimination. The sole purpose of the 50 per cent quota was to achieve the same ratio of minority workers in the crafts at the Gramercy plant as the ratio of minority employees in the local labor force. A racial preference imposed to achieve a ratio of minority workers in designated jobs, even if this ratio is deemed socially desirable by corporate or union executives or government officials, is a violation of Title VII.

4. The claims that Kaiser had a reasonable basis to believe that past discrimination had occurred are without merit. Kaiser did not enact the racial quota as a "remedy" for past discrimination. Moreover, the low percentage of minority craftsmen at the Gramercy plant was not due to discrimination by Kaiser, but to

the unavailability of minority craftsmen with the requisite skills in the labor force. Kaiser tried a number of affirmative action measures to increase the ratio of minority craftsmen at the plant, but these craftsmen were not available. Furthermore, the speculation as to an arguable or potential discriminatory effect of the prior experience requirement for craftsmen at the Gramercy plant is invalid. The prior experience requirement was neutral on its face and business related. No suggestion has been made of any basis for questioning the business necessity of the prior experience requirement. Kaiser did not believe that the prior experience requirement was invalid in any way, and this requirement was not a justification for the institution of the racial quota.

5. To the extent that Kaiser and USWA believed the 50 per cent quota to be remedial, the "remedy" was for discrimination believed to have been practiced by society at large against the various classes of minorities, not against individuals. No attempt was made to provide a "remedy" to any individual victim of discrimination by Kaiser. None of the individuals preferred under the racial quota was ever subjected to employment discrimination by Kaiser. No attempt was ever made to determine whether any of the preferred minority employees had suffered discrimination at the hands of society. The racial quota embodied a policy of race discrimination against white individuals to achieve the general advancement of minority classes. This policy is unlawful under Title VII.

6. The legislative history of Title VII does not demonstrate an intent to permit the voluntary enactment of racial quotas by private parties to achieve the advancement of minority groups. This interpretation of USWA is drawn from a strained reading of the repeated and vigorous denials of the sponsors of Title VII that the statute would require quotas. The negative inference of USWA is inconsistent with the express prohibition of any race discrimination in the statute, the decisions of this Court, and other statements of the sponsors of Title VII.

7. The discrimination against white employees cannot be validated by the executive orders requiring affirmative action by government contractors. To the extent that the executive orders and the affirmative action regulations of the OFCC conflict with Title VII, the statute prevails. An affirmative action practice that overtly discriminates against non-minority employees is neither reasonable nor legal. In addition, a training program that discriminates on the basis of race is not valid simply because it provides opportunities to the disadvantaged class as well as the preferred class.

8. The racial quota of Kaiser and USWA carries significant adverse consequences. Advancement of minorities solely on the basis of race injures innocent non-minority workers and may lead to increased racial animosity. Moreover, this policy could enhance stereotyped beliefs about minority employees held in the society at large. Furthermore, policies of advancement of employees that are unrelated to qualifications or ability may undermine the incentive of employees to be productive. In addition, the "zone of reasonableness" rule proposed by Kaiser and the Government may have uncontrollable and undesirable consequences. Judicial approval of a rule permitting discriminatory treatment of white workers could lead to resentment among whites of the entire equal rights movement. In addition, if the rule were applied even-handedly, it could require the judicial approval in the future of programs that discriminate against minority workers, when the discriminatory programs are alleged to be "remedies" for past disparate treatment of white employees under affirmative action programs. The long term objective of racial equality will not be served by a program that spurs the advancement of minorities only by denying opportunities to whites.

I. The Racial Quota Imposed By Kaiser And USWA Is Illegal Under Title VII Because It Discriminates Against Non-Minority Employees.

The 50 per cent minority quota of Kaiser and USWA is an openly discriminatory system of selection of applicants for on-the-job training programs. The selection quota requires that minority employees be favored over more senior white employees solely on the basis of race. Under Title VII of the Civil Rights Act of 1964 and the authorities interpreting this statute, the reverse racial quota is illegal.

A. Race Discrimination Against Any Employee Is Prohibited Under Title VII, Whether or Not the Employee Is a Member of a Government-Recognized Minority Group.

Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination in employment against *anyone* on the basis of race.[145] Section 703(a) of Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[146] Moreover, Section 703(d) prohibits discrimination on grounds of race in the selection of applicants for training programs. It states:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[147]

Section 703 makes no exception for discrimination

145 42 U.S.C. §2000(e) *et seq.*
146 *Id.* §2000(e)-2(a).
147 *Id.* §2000(e)-2(d).

against white employees. In fact, the categorical prohibition of *any* racial discrimination establishes that Title VII prohibits discrimination against white workers as well as minority employees. Thus, the racial quota of Kaiser and USWA violates the provisions of Title VII.

Our reading of Title VII is consistent with the decisions of this Court. In *McDonald v. Santa Fe Trail Transportation Co.*,[148] the Court ruled that white persons may assert claims under Title VII and the same standards that are used in cases brought by minority employees are applicable to the claims of whites.[149] The Court stated:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against members of any particular race. . . .
>
> This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover all white men and white women and all Americans," and create an "obligation not to discriminate against whites." We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon

148 427 U.S. 273, 96 S.Ct. 2574 (1976).
149 427 U.S. at 278-80, 96 S.Ct. at 2578-79.

> the same standards as would be applicable were they Negroes and Jackson white. (Citations omitted).[150]

The conclusion that whites are protected by Title VII is also supported by the decision of the Court in *Griggs v. Duke Power Co.*[151] In *Griggs*, the Court held that tests administered to determine selection for employment that have a disproportionate adverse impact on minority applicants must be job related. In reviewing the purpose and intent of Congress in adopting Title VII, the Court stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[152]

150 *Id.*
151 401 U.S. 424, 91 S.Ct. 849 (1971).
152 401 U.S. at 430-31, 91 S.Ct. at 853.

Thus, the Court's holding establishes that Title VII outlaws preferences in favor of minority as well as non-minority employees.

In the decision last term in *City of Los Angeles, Department of Water and Power v. Manhart*,[153] the Court in a sex discrimination case stated that Title VII was "designed to make race irrelevant in the employment market."[154] The Court held that the policy of the statute requires a focus on fairness to individuals, not fairness to classes.[155] In addition, the Court stated:

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . (Citation omitted).[156]

In another decision rendered last term, *Furnco Construction Corp. v. Waters*,[157] the Court reiterated this principle. It said: "It is clear beyond cavil that the obligation im-

153 435 U.S. 702, 98 S.Ct. 1370 (1978).
154 *Id.* at 709, 98 S.Ct. at 1376.
155 *Id.*
156 *Id.* at 708, 98 S.Ct. at 1375.
157 ___ U.S. ___, 98 S.Ct. 2943 (1978).

posed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."[158]

The decisions of this Court establish the illegality of the racial selection criterion used for the craft training programs. The application of the racial quota creates a preference in favor of a minority worker, to the detriment of a white, each time a selection is made of a minority worker without the highest seniority status. The 50 per cent quota creates two lines of seniority, one for the preferred minority workers and one for whites. For each person selected from the plant-wide seniority line for the training programs, a person must be selected from the seniority line of minority employees. Applying the "same standards as would be applicable"[159] if separate seniority lines favoring whites had been created, the racial quota is illegal under Title VII.[160]

Our interpretation of Title VII is also supported by the legislative history of the statute. This legislative history is reviewed exhaustively in the Brief of USWA and it is not necessary to present it in full in this brief. As USWA suggests, the legislative history demonstrates that the sponsors intended to prohibit

158 *Id.* at ____, 98 S.Ct. at 2951.

159 *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. at 280, 96 S.Ct. at 2579.

160 See, e.g., *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969).

any *requirement* of a preference to achieve a racial balance.[161] In addition, this history establishes that Congress intended to prohibit preferences in favor of any race.[162]

The intent of Congress concerning Title VII is demonstrated in the "Objections and Answers" submitted by Senator Joseph S. Clark, a floor manager of the bill. It states:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.[163]

The statement that "[q]uotas are themselves discriminatory"[164] is supported by the observations of other sponsors of Title VII. In response to the claim that Title VII would allow the Commission to impose quotas, Senator Hubert S. Humphrey stated:

> [T]he very opposite is true. Title VII prohibits discrimination. In effect, it says that race,

161 42 U.S.C. §2000e-2(j); Brief of USWA at 25, 70-74.

162 *McDonald v. Santa Fe Trail Transport Co.*, 427 U.S. 273, 280, 96 S.Ct. 2574, 2578-79 (1976).

163 110 Cong. Rec. 7218 (1964).

164 *Id.*

> religion and national origin are not to be used as the basis for hiring and firing. . . .[165]

Senator Harrison A. Williams, Jr., another supporter of the bill, stated that "[t]hose opposed . . . should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."[166] He added: "There is an absolute absence of discrimination for anyone; and there is an absolute prohibition against discrimination against anyone."[167]

If any doubt as to the "color blind" meaning of Title VII could have existed, it should have been erased by the explanation of the bill submitted by Senator Humphrey, which had been approved by the bipartisan floor managers of the bill in both houses of Congress.[168] It said:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment to any particular group, and any person, whether or not

165 *Id.* at 6549.

166 *Id.* at 8921.

167 *Id.*

168 *Id.* at 11846-48.

> a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. . . .[169]

Thus, no hidden meaning exists in the statute. The apparent intent to prohibit *any* race discrimination is supported by the legislative history.[170]

Contrary to the claims of Kaiser[171] and the Government,[172] the rejection of proposed amendments to Title VII in 1972 did not change the meaning or intent of the statute. Amendments proposed by Senator Sam Ervin to prohibit quotas and goals were rejected in the Senate, but this action does not suggest that the Senate wished to *approve* preferential quotas. Based on the language and legislative history of the statute, Congress had every reason to believe that racial quotas were already prohibited by Title VII. Although some courts in special circumstances may have approved numerical ratios in an effort to correct for past discrimination under Title VII,[173] this Court had announced in *Griggs v. Duke Power Co.* that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has

169 *Id.* at 11848.

170 The legislative history is also reviewed exhaustively in *Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3d Cir., 1975) and *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir., 1974). Both courts drew the same conclusions.

171 Brief of Kaiser at 34-35.

172 Brief of the Government at 31-35.

173 See Brief of the Government at 33.

proscribed."[174] Thus, a system of racial quotas to achieve numerical ratios was not believed to be authorized under the statute.[175] Moreover, the Senate may have believed the Ervin amendments could undermine the power of the courts to grant remedies to individuals victimized by race discrimination. Furthermore, the failure to take a proposed action in 1972 cannot provide a basis for interpretation of a bill passed in 1964.

In the House, Rep. John H. Dent proposed an anti-quota amendment to H.R. 1746, a bill designed to expand the enforcement powers of the EEOC. Neither the enforcement portion of the original H.R. 1746 nor the Dent amendment ever was put to a vote.[176] The debate on the amendment, however, establishes the understanding of the members of the House that quotas and preferences were already prohibited under Title VII.[177] The amendment offered by Rep. Dent was not intended to make any change in the substance of Title VII, but only to make emphatic the prohibition of

174 401 U.S. 424, 431, 91 S.Ct. 849, 853 (1971).

175 See the discussion of the United States Court of Appeals for the Fifth Circuit in *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980, 995 (5th Cir., 1969): "[C]reating fictional employment time for newly-fired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is against such preferential treatment on the basis of race . . . ."

176 A substitute for the enforcement provisions of H. R. 1746 was offered by Rep. John N. Erlenborn and was eventually passed by the House.

177 See, e.g., 117 Cong. Rec. 31963.

preferences imposed by the government and quell the fears of some House members concerning the potential results of expanded EEOC enforcement authority.[178] Rep. Augustus F. Hawkins, who spoke in favor of the amendment, stated repeatedly that Title VII already prohibited the use of quotas.[179] He said:

> Again some say that this bill seeks to establish quotas and stop discrimination in reverse. Not only does title 7 prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. . . .[180]

In addition, Rep. Gerald R. Ford, who supported the substitute bill, indicated a belief that there was no necessity to amend the law to prohibit quotas. He said:

> The Philadelphia plan, which is what we are really talking about, does not have anything to do with quotas. I honestly think that the gentleman from Pennsylvania is drawing a false issue by the kind of language that he is employing in his proposed amendment. I just do not think that we ought to interfere with

178 117 Cong. Rec. 31964, 31965.

179 *Id.* at 31963, 31964.

180 *Id.* at 31963.

> this program with this kind of amendment. . . .[181]

Thus, the members of the House who spoke on the Dent amendment believed that it was unnecessary. This legislative history confirms our interpretation of the meaning of Title VII.

The amendments to Title VII proposed in 1972 to prohibit quotas were redundant and unnecessary. The failure of Congress to pass the amendments is no more enlightening on the meaning of the statute than any other failure of Congress to act. As this Court stated in *International Brotherhood of Teamsters v. United States*,[182] the only important Congressional views for purposes of statutory interpretation are those held in 1964. The Court said:

> [T]he section of Title VII that we construe here, §703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted §703(h) in 1964, unmistakable in this case, that controls.[183]

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181 *Id.* at 32091.

182 431 U.S. 324, 97 S.Ct. 1843 (1977).

183 *Id.* at 354 n. 39, 97 S.Ct. at 1864 n. 39.

Thus, the failure of Congress to pass the 1972 anti-quota measures does not mean that Title VII in 1964 was meant to permit quotas detrimental to whites.[184]

The reliance of Kaiser and the Government on the 1972 legislative history of the amendments to Title VII is an admission that the statute means what it says. If these parties could find any suggestion in the language of Title VII or the 1964 legislative history that quotas preferential to minority workers are valid, they would never have relied on a theory of intent divined from actions not taken in 1972. Therefore, Title VII prohibits an employer from granting a preference to minority workers in order to achieve a desired minority ratio in designated jobs.

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184 Even if the non-actions of Congress that are not taken after the passage of a bill could change the apparent meaning of the law, the 1972 non-actions of Congress are not the most recent instance of a Congressional failure to act. In 1978, Congress considered anti-quota provisions in connection with an appropriations bill. 124 Cong. Rec. H5371 (daily ed., June 13, 1978). See Brief of the American Civil Liberties Union and the Society of American Law Teachers Board of Governors Amici Curiae 90-95. Congress did not pass these amendments as they were deleted in a House-Senate conference. Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978). However, both houses of Congress voted in favor of the anti-quota amendments. The House passed the amendment 232-177. 124 Cong. Rec. H5379 (daily ed., June 13, 1978). The Senate passed the amendment on a voice vote. 124 Cong. Rec. 16280. These recent votes of Congress in not taking any action are just as persuasive in demonstrating an anti-quota intent as the failure to act in 1972.

B. The Analogous Constitutional Decisions of the Court Establish that the 50 Per Cent Racial Quota Would Not Be Upheld if It Were Imposed By the Government.

This case arises under Title VII.[185] No claim for relief based on the constitution is presented.[186] Therefore, unlike the decision in *Regents of the University of California v. Bakke*,[187] the Court is not presented with parallel statutory and constitutional claims and it should be unnecessary to determine whether the reach of the statutory no-discrimination requirement equals or exceeds the constitutional prohibition of discrimination.[188] However, the race cases decided by this

185 The suit was also brought pursuant to 42 U.S.C. §1981. App., 13. However, reliance on 42 U.S.C. §1981 is unnecessary and the district court and court of appeal did not base their decisions on this statute.

186 A theoretical constitutional issue could arise if the Court determined that Congress in Title VII, or by its subsequent failure to enact amendments to Title VII, authorized the executive branch to require the imposition of racial preferences. However, this case does not involve a government-imposed quota, even though the regulations and requirements of the OFCC were a motivating force in the decision of Kaiser and USWA to institute the 50 per cent quota.

187 ___ U.S. ___, 98 S.Ct. 2733 (1978).

188 This case is also unlike *Bakke* in that the prohibition of race discrimination in Title VII applies to private parties, while in *Bakke* the statutory claim was made under Title VI, which is applicable to public institutions receiving federal assistance. 42 U.S.C. §2000d (1976). The prohibition of race discrimination of Title VI parallels the constitutional prohibitions of race discrimination by the federal or state governments, U.S. Const. Amend. V, XIV, while the Title VII prohibition of discrimination by private parties is less analogous to the constitutional requirement.

Court under the constitution and the decision in *Bakke* do provide analogous authority that the racial quota of Kaiser and USWA is illegal under Title VII.[189]

In *Bakke*, the Court invalidated a special medical school admissions program that reserved 16 per cent of the places in the entering class for members of minority groups. As white applicants were not permitted to compete for the seats reserved for minority applicants, the special admissions program was ruled illegal.[190] This decision provides support for the holding of the court of appeals because half of the openings in the craft training programs at the Gramercy plant were reserved for minority workers. White bidders with the requisite seniority had no opportunity to obtain entry into these positions.

The racial quota of Kaiser and USWA is more invidious than the 16 per cent quota in *Bakke* because it robs non-minority workers of seniority rights accrued by years of service to Kaiser and USWA. No loss of an accrued right of white applicants was present in *Bakke*. Moreover, the First Amendment interest in furthering academic freedom by attaining a diverse student body, which tended to support the consideration of race in

189 See *General Electric Co. v. Gilbert*, 429 U.S. 125, 133, 97 S.Ct. 401, 407 (1976), where the Court held that decisions rendered pursuant to the Fourteenth Amendment provided a "useful starting point" for Title VII analysis.

190 ___ U.S. at ___, 98 S.Ct. at 2764. (Powell, J., announcing the judgment of the Court.)

Bakke,[191] is not present in this case. Furthermore, in *Bakke* the admissions program as a whole was not based solely on objective criteria.[192] The consideration of many subjective factors may have made the consideration of race less objectionable. In this case, on the other hand, the seniority criterion is not subjective: it provides benefits based on time in service to the employer, applies equally in the absence of discrimination in the provision of seniority rights, and is valid under Title VII.[193] Thus, the discriminatory program of Kaiser and USWA is more objectionable than the admissions program in *Bakke*.

The 50 per cent quota would also be invalid under the equal protection standard ordinarily implemented in race cases by this Court. Race is a suspect classification[194] and race discrimination is subjected to the closest judicial scrutiny.[195] Under the strict scrutiny analysis, a classification imposed by the Government must serve a compelling or necessary governmental interest and must be carefully tailored to

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191 *Id.* at ____, 98 S.Ct. at 2760-64 (Powell, J.).

192 See, e.g., *Id.* at ____, 98 S.Ct. at 2740 (Powell, J.); 98 S.Ct. at 2807 (Blackmun, J., dissenting).

193 42 U.S.C. §2000e-2(h) (1976).

194 *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944).

195 *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823 (1967).

achieve this goal.[196] The justifications offered for the 50 per cent quota in this case could not meet this standard.

Although Kaiser and the Government fear to admit it,[197] the primary purpose for the racial quota was to achieve the same minority ratio in craft jobs at the Gramercy plant as the percentage of minority workers in the local labor force. The one-for-one selection criterion was imposed "to achieve a desired minority ratio."[198] The "desired minority ratio" in this case was the 39 per cent minority ratio in the local labor force.[199] Once this goal is reached, Kaiser "will then revert to a ratio of what that percentage is"[200] in order to maintain the "desired minority ratio" in the crafts indefinitely.

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196 Compare *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333 (1969) ("compelling interest" test) with *Regents of the University of California v. Bakke*, ____ U.S. ____, ____, 98 S.Ct. 2733, 2756-57 (1978) (Powell, J.). See the dissenting opinion of Brennan, J., with whom Marshall, J., joined, in *Kahn v. Shevin*, 416 U.S. 351, 357-58, 94 S.Ct. 1734, 1738 (1974):

> "[S]uspect classifications can be sustained only when the state bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means.

197 USWA, at least, admits that the motivation for implementing the racial quota was not past discrimination. The racial quota was designed to increase the ratio of minority workers in craft jobs.

198 This is the reason for the implementation of the racial quota stated in the 1974 Labor Agreement between Kaiser and USWA. App., 137.

199 App., 60.

200 App., 69.

However, the goal of achieving a desired ratio of any race in designated jobs would not be constitutionally permissible. As the opinion of Mr. Justice Powell stated in *Bakke:*

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.[201]

In their attempts to circumvent the real purpose of the 50 per cent quota, Kaiser and the Government characterize it as a purported "remedy" for past discrimination.[202] These parties assert that, had Kaiser undertaken an analysis of whether a prima facie statistical case for a Title VII claim could have been made out by a minority plaintiff for the Gramercy plant, Kaiser "[c]ould [r]easonably [b]elieve"[203] that a prima facie case existed. Of course, no such analysis

201 *Regents of the University of California v. Bakke,* ___ U.S. ___, ___, 98 S.Ct. 2733, 2757 (1978) (Powell, J.).

202 E.g., Brief of Kaiser at 46-49; Brief of the Government at 42-54.

203 Brief of the Government at 42.

was made.[204] In any event, even if the goal of correcting past discrimination were the reason for the racial quota,[205] the means employed to achieve the goal in this case are virtually unrelated to the goal.

A true "remedy" granted to an individual must be designed to correct past discrimination against the individual: "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights. . . ."[206] In this case, however, none of the parties preferred under the racial quota were subjected to past discrimination by Kaiser.[207] As the Government concedes, "[i]t is true, of course, that the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant."[208] Thus, the class-based preference of Kaiser and USWA was not only imprecisely tailored, it was largely unrelated to the pur-

204 As USWA states in its brief, "[t]he program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant." Brief of USWA at 5.

205 We do not question that this goal would be an important or compelling goal if the remedy were for discrimination against identified individuals.

206 *Regents of the University of California v. Bakke,* ___ U.S. ___, ___, 98 S.Ct. 2733, 2753 (1978) (Powell, J.)

207 The district court found that "none of its black employees who were offered on-the-job training opportunities over more senior white employees . . . had been the subject of any prior employment discrimination by Kaiser." 415 F.Supp. at 764.

208 Brief of the Government at 52.

ported goal of remedying any actual past discrimination.[209]

Kaiser and the Government recognize that the racial quota is not designed as a remedy for discrimination against individuals. Therefore, they argue that it would be too difficult to enact individual remedies.[210] This argument in essence is based on administrative convenience; the "zone of reasonableness"[211] standard would make it administratively easier to correct for assumed past disparities. Administrative convenience, however, cannot justify a policy that discriminates on the basis of race.[212] If Kaiser and USWA wish to provide remedies to victims of past discrimination by

209 The sole basis for the purported remedial purpose is an assumption or stereotype about individuals because of their membership in particular racial groups. These assumptions in general may have validity. However, assumptions about the preferred individuals could not justify overt discrimination against others. In addition, preferences based on assumptions necessarily could not be tailored to correct only for the actual amount of past discrimination.

210 Brief of the Government at 38-39. Brief of Kaiser at 30-31, 44 *et seq.*

211 Brief of Kaiser at 45.

212 See the dissenting opinions of the justices who viewed sex as a suspect classification in *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974). Mr. Justice Brennan, who was joined by Mr. Justice Marshall, believed that a statute providing a property tax exemption to widows was not tailored carefully enough to satisfy the appropriate judicial scrutiny. "The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means." 416 U.S. at 360, 94 S.Ct. at 1740. Mr. Justice White also found that the statute was inappropriately tailored. He said:

> I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to widows who do not need the help and denies it to widowers who do. It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an adequate justification for discriminations based purely on sex. (Citations omitted).
>
> 416 U.S. at 361, 94 S.Ct. at 1740.

granting preferences that are harmful to whites, the remedies must be properly tailored to achieve the end without unnecessary damage to the rights of innocent employees.

The 50 per cent racial quota would not be valid under the analagous constitutional decisions of this Court. Therefore, it should be invalidated under Title VII.

II. The Purported Justifications Offered By Kaiser, USWA And The Government For The 50 Per Cent Quota Are Insufficient To Validate The Policy Of Open Discrimination Against White Workers.

The 50 per cent quota of Kaiser and USWA is a discriminatory policy that disadvantages a white employee for each minority worker who is preferred. This policy violates Title VII. The asserted justifications for the racial quota are not sufficient to justify a discriminatory racial practice. Therefore, the 50 per cent quota should be held invalid.

A. The 50 Per Cent Quota Was Not a Remedial Measure and Could Not Be Upheld in Any Event Because It Was Not Restricted to Individual Victims of Past Discrimination.

The Government in effect concedes that the 50 per cent quota is invalid to the extent that it serves the actual purpose for which it was implemented, the achievement of a desired ratio of minority workers in craft jobs. Unlike USWA,[213] the Government attempts to avoid the issue in this case by characterizing the facts as if Kaiser had "identified" past discrimination at the Gramercy plant.[214] The Government apparently feels free to ignore the record and engage in gratuitous speculation and self-serving, after-the-fact rationalizations concerning the racial quota because of the alleged "limited"[215] inquiry at the trial. Kaiser does not fully resort to this approach, but does assert that "identified discrimination" by society, causing a "clearly defined deprivation," was a motivation for the 50 per cent quota.[216]

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213 USWA does face up to the issue, but its strained interpretation of the legislative history of Title VII does not validate discriminatory racial preferences. See discussion in Part II(B) *infra*.

214 Brief of the Government at 42 *et seq.*

215 Brief of the Government at 43. The Government also states: "[T]he record does not establish in detail the factual basis for Kaiser's concerns."

216 Brief of Kaiser at 46, 47.

Contrary to the overt or implied assertions of these parties,[217] the record does establish the reasons for the adoption of the racial quota and they do not include an intent to remedy any specific past discrimination. Moreover, notwithstanding the purported "evidence" offered in this Court from outside the record by the Government, past employment discrimination had not occurred at the Gramercy plant and a prima facie statistical case could not have been made out concerning the craft positions. Furthermore, as all the parties concede, the individuals preferred under the 50 per cent quota were not subjected to past discrimination by Kaiser. A racial preference would be valid only to the extent that it corrected on an individual basis for past race discrimination. Therefore, the contentions of Kaiser and the Government should be rejected.

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217 *Id.* We have already reviewed, in our Brief for Respondents in Opposition to the Petitions for Writs of Certiorari, the interest in this case shown by the EEOC and our efforts to keep the EEOC informed of events occurring prior to, at, and after the trial. Brief of Respondents in Opposition to the Petitions for Writs of Certiorari at 5-6. The EEOC contacted counsel for each party and appears to have apprised itself of the potential role it could play in achieving a not "limited" record. The EEOC declined to appear at the trial and instead apparently chose to adopt its current role on appeal of speculating as to what the proof might have been.

In addition to our efforts to keep the EEOC informed of developments at the trial level, the district court required the posting of the class notices in this case, containing a description of the litigation, on all employee bulletin boards at the Gramercy plant and at the union hall of USWA. App., 24-25. It is unlikely that any minority employees were unaware of this case or its potential effect on them, yet none intervened to offer any evidence.

1. The reasons for the racial quota are fully established in the record.

A complete inquiry into the reasons for the establishment of the racial quota was conducted at the trial. Kaiser presented its director of equal opportunity affairs for the entire Kaiser corporation,[218] Thomas M. Bowdle. Mr. Bowdle indicated that the reasons for the adoption of the racial quota were the low percentage of minority workers in the crafts,[219] suggestions made by officials of the OFCC as to this low utilization,[220] and a desire to make up for assumed past discrimination against minorities by society at large.[221] Mr. Bowdle knew of "no specific evidence of discrimination at the Gramercy plant."[222] The racial quota was not implemented to correct for past discrimination by Kaiser.[223] Mr. Bowdle stated:

> Q. Mr. Bouble (sic), you have referred, during the course of your testimony, to the present effects of past discrimination. Do I understand you to indicate that these employees that are now being favored were discriminated against by Kaiser?
>
> A. No.[224]

218 App., 89.
219 App., 90-91.
220 App., 93.
221 App., 90, 94, 108.
222 App., 108.
223 App., 99.
224 App., 99.

The statements of Mr. Bowdle are direct, on-the-record denials of an intent of Kaiser to correct for any past discrimination by the company through the 50 per cent quota. These statements of the person most likely to have knowledge of the motivations of Kaiser should be more persuasive than after-the-fact rationalizations presented by the Government.[225]

The statements of Mr. Bowdle were supported by the testimony of Dennis E. English, the industrial relations superintendent at the Gramercy plant. He stated: "We do not think that we have discriminated inside our plant."[226] In addition, the motivation of USWA for adopting the racial quota is stated in its brief. It says:

> [The provision establishing the one-for-one quota was] the core of the national program established by Kaiser and USWA to increase the proportion of minorities in skilled craft positions at all of the Kaiser plants. The program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the

225 The Government asserts that "Kaiser and the Steelworkers were in the awkward position of seeking to defend their training programs without admitting liability for previous discrimination against blacks . . . ." Brief of the Government at 43. However, USWA did try to show past discrimination by Kaiser. Moreover, it is one thing to suggest that Kaiser and USWA had no incentive to admit past discrimination, and quite another to advance a theory that carries the implied assertion that Mr. Bowdle's specific denials of any motivation to cure past discrimination by Kaiser were misrepresentations.

226 App., 81.

particulars of the situation at the Gramercy plant.[227]

Furthermore, the 1974 Labor Agreement specifically states the reason for the 50 per cent quota. It says that the purpose of the "goals and time tables" is "to achieve a desired minority ratio."[228] Thus, the racial quota was implemented to accomplish the statistical objective of a minority ratio equal to the percentage of minority workers in the local labor force. It was not motivated by speculation concerning the possibility of past discrimination by Kaiser.

2. Persuasive evidence of past discrimination by Kaiser could not have been presented at the trial because it does not exist.

The Government in effect concedes that the racial quota is invalid under the factual determinations of no discrimination of the district court and court of appeals. Rather than facing the issue presented here, the Government relies on an elaborate and inaccurate scenario in which Kaiser is represented as fearful of being found liable for Title VII violations at the Gramercy plant.[229] While not fully adopting this posture, Kaiser

227 Brief of USWA at 5.

228 App., 137.

229 Brief of the Government at 42 *et seq.* This position is also a virtual concession of the invalidity of the regulations of the OFCC as approved by the EEOC, which require preferences for minority workers whenever "underutilization" is found to exist, regardless of the reasons for the statistical disparity in the employment of

suggests that the existence of "identified discrimination" was established.[230] The obvious belief of these parties that a racial preference is valid only to correct for identified past discrimination is a concession that the legal holding of the court of appeals is correct.[231] In this case, moreover, there was no identified past discrimination at the Gramercy plant. Thus, the decision of the court of appeals should be upheld.

Although the percentage of minority craftsmen at the Gramercy plant was far lower than the ratio of minority workers in the local labor force, it was not lower than the percentage of minority craftsmen with the requisite skills in the work force. The evidence established that the percentage of minority craftsmen at the Gramercy plant was small "because of the unavailability of trained, educated and qualified minorities."[232] The percentage of available minority

minority workers. The EEOC publicly proclaims through its regulations that in order to grant "affirmative action" preferences through the achievement of goals and timetables, "[i]t is not necessary that a self-analysis establish a violation of Title VII." 29 C.F.R. §1608.4(b). In light of this public posture, it is hard to understand the necessity to imagine a scenario assertedly presenting a basis for a belief by Kaiser in the existence of past discrimination at the Gramercy plant.

230 Brief of Kaiser at 46 *et seq.*

231 The Government makes a token argument that the racial quota is authorized under Executive Order 11246, Brief of the Government at 54 *et seq.*, but retrieves the profferred issue by stating that there is "no need in this case to consider whether or to what extent, Title VII permits the Executive Order to authorize or require government contractors to undertake affirmative action measures that would be impermissible if undertaken by other employers. For the reasons we have shown, the Gramercy training programs were proper under Title VII wholly apart from the fact that Kaiser is a government contractor." *Id.* at 55.

232 App., 62.

craftsmen in the local labor force was no greater than the percentage of minority craftsmen employed by Kaiser.[233] Kaiser was unable to locate and hire minority craftsmen despite affirmative action efforts, including the establishment of goals and timetables, advertising in New Orleans and Baton Rouge newspapers, advertising in minority newspapers, maintenance of a minority craft file, and a policy to "always look for the blacks before the whites."[234] A significant number of minority craftsmen were not found "because they aren't available."[235] As the court of appeals stated, the low ratio of minority craftsmen at the Gramercy plant "reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser."[236]

In an effort to suggest that this evidence is "subject to question,"[237] the Government asks the Court to take judicial notice of census statistics purportedly showing a disparity between the ratio of black craftsmen at the Gramercy plant and available black craftsmen in the work force.[238] In fact, Kaiser never considered any such alleged disparity in instituting the 50 per cent quota. Nevertheless, we welcome the discussion of the census

233 App., 76.

234 App., 62-63.

235 App., 63.

236 563 F.2d at 224 n. 13.

237 Brief of the Government at 44.

238 Brief of the Government at 44-46. These statistics are also relied on by a number of parties appearing as *amici curiae*.

statistics[239] because the Government in relying on them apparently admits that the disparity between the ratio of black craftsmen at the Gramercy plant and the percentage of minority workers in the general labor force would not prove a prima facie case in a Title VII suit involving the crafts.

In support of its claim that a statistical disparity existed between the ratio of minority craftsmen at Kaiser and the minority craftsmen in the local labor force, the Government relies on census statistics for "craftsmen and kindred workers" for the State of Louisiana.[240] These statistics show that 15.7 per cent of the "craftsmen and kindred workers" were black.[241] The Government is unable to provide any data by specific craft category for the Gramercy area, but assumes that the general data for craft and kindred workers for the entire state is illustrative of the availability of skilled craftsmen of the type required by Kaiser in the Gramercy area.[242]

The census data relied on by the Government could not be probative. As the Government admits but fails to discuss, its data does not reflect the statistics for

239 We have no objection to the Court taking judicial notice of any reliable evidence. We assume that the Court will not refuse to consider the census statistics. However, as we shall point out, these statistics could have virtually no probative value toward buttressing the argument of the Government.

240 Brief of the Government at 45.

241 *Id.*

242 *Id.*

skilled heavy industrial craftsmen, but instead reflects a general lumping together of craft *and kindred* workers. The general data for craft and kindred workers reported on the census includes such varied jobs as upholsterers, bakers, telephone linemen, locomotive engineers and printers.[243] In addition, while census data may be useful in cases where the statistics reflect specific jobs, it would be impossible in this case to break out the craftsmen from the kindred workers.[244] Indeed, the questions asked in the census would not provide a basis for distinguishing skilled craftsmen from apprentices, helpers or other persons working in areas kindred to craft jobs.[245] Moreover, as the Government concedes, the census does not break down the general categories of craft and kindred workers for the Gramercy area.[246] Thus, the Government is not even able to provide specific categories for the Gramercy area of its lumped-together data for craft and kin-

243 U.S. Bureau of the Census, Census of Population, Vol. 1: Characteristics of the Population, Part 20, Louisiana, Table 172.

244 The data is compiled from questions that permit only a general lumping of craft and kindred workers. The questions are: (a) "What kind of work was he doing?" (Examples of answers: "TV repairman, sewing machine operator, spray painter, civil engineer, farm operator, farm hand, junior high English teacher"); (b) "What were his most important activities or duties?" (Examples of answers: "Types, keeps account books, files, sells cars, operates printing press, cleans buildings, finishes concrete"; (c) "What was his job title?" U.S. Bureau of the Census, 1970 Census of Population; Vol. 1: Characteristics of the Population, Part 20, Louisiana, Appendix B, App. — 40.

245 See n. 244 *supra*.

246 Brief of the Government at 45 n. 21.

dred workers. The purported prima facie case that Kaiser could have worried about, had it realized the need to do so, would have been based on extrapolations from statewide data for "craft and kindred" workers.

In addition to being useless on its face to support a prima facie showing of past discrimination, the census data of the Government does not fare well when compared with other statistics. For instance, in addition to its report on the census, the Government in another part of its brief provides more detailed and far different information regarding the availability of skilled craftsmen. It states:

> In 1969, 58 percent of the nation's local craft unions reported to the Equal Employment Opportunity Commission that they had no black members; nationwide, the electricians unions were 1.9 percent black; the ironworkers were 1.7 percent black; the plumbers 0.8 percent black; and the sheet metal workers 0.7 percent black.[247]

To believe both the census data and the EEOC data offered by the Government, the Court would have to conclude that the availability of skilled craftsmen in Louisiana is about 1,200 per cent of the national

247 *Id.* at 59.

average.[248] A basis for this conclusion has not been established.

The disparity between census data and a more detailed analysis relating to the crafts is exemplified by the litigation relating to the Philadelphia plan. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[249] the district court stated that the Department of Labor found the minority representation in 1969 in six specified crafts to be "approximately one (1) percent" although "the overall minority groups representation in the construction industry in the five-county Philadelphia area was thirty (30) percent . . . ."[250] We doubt that the Government would question these figures. Nevertheless, the 1970 census reported the minority ratio of craftsmen and kindred workers for the Philadelphia area to be 11.2 per cent.[251] If the relationship of actual to census figures for Philadelphia holds true for Louisiana, the availability of skilled craftsmen in Louisiana would be 1.4 per cent.[252]

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248 The average of the reported percentages at pages 50-51 of the Brief of the Government is 1.275. The asserted availability of craftsmen in Louisiana is 15.7 per cent. Brief of the Government at 45.

249 311 F.Supp. 1002 (E.D. Pa., 1970).

250 *Id.* at 1005.

251 U.S. Bureau of the Census, 1970 Census of Population, Vol. 1: Characteristics of the Population, Part 40, Philadelphia, Pa. — N.J., SMSA, Table 172.

252 $\frac{1\%}{11.2\%} = \frac{1.4\%}{15.7\%}$.

The inflated nature of the census figures would not be surprising even if the data were collected in a reliable manner. As the United States Commission on Civil Rights reported in 1976, minority representation in the crafts is exaggerated even on EEO forms. It said:

> The EEO-3 statistics include along with journeymen doing skilled construction work, several other categories of union members who perform less-skilled or nonconstruction work . . . . These other categories are: (1) apprentices; (2) union members — sometimes journeymen — who do not work in the construction industry; (3) other workers, with titles such as helpers and tenders, who are neither apprentices nor journeymen.[253]

Thus, the data offered by the Government is not reliable.

Even if the Court were to rely on the census statistics, a close examination of this data tends to confirm the evidence in the record. The census report breaks out the general data for only a few of the craft categories employed by Kaiser. In addition, the census data does not distinguish heavy industrial skills from those employed generally by craftsmen.[254]

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253 The Challenge Ahead, Equal Opportunity in Referral Unions (U.S. Comm'n. on Civ. Rts., May, 1976) at 40.

254 E.g., a skilled "general repairman" in heavy industry would be far different from the average general repairman reported on the census. A general repairman at Kaiser would install, repair, assemble and replace virtually all types of heavy industrial equipment.

Nevertheless, in some of these categories the minority representation is very low, even for craft and kindred workers. For instance, the census indicates that only three per cent of the craft and kindred electricians were black.[255] At least two craft categories at Kaiser required electrical skills.[256] The census reported that less than 4.5 per cent of those involved in "air conditioning, heating and refrigeration" work were black.[257] One of the craft categories at Kaiser was air conditioner repairman.[258] Most of the other census categories are generalized. While the Government represents the census as reporting that "blacks comprised . . . 10.4 percent of the State's machinists,"[259] this census category actually includes "[m]achinists and job and dye setters."[260] In one craft of Kaiser that is fairly representative of a general craft category, carpenter-painter, Kaiser employed 16 per cent minority craftsmen at the Gramercy plant.[261]

If Kaiser had ever thought to extrapolate a statistical argument from census data to support an imaginary Title VII claim against itself, it would not have feared that the analysis of the Government could constitute a

255 U.S. Bureau of the Census, 1970 Census of Population, Vol. 1: Characteristics of the Population, Part 20, Louisiana, Table 172.

256 These were electrician and instrument and electrical repairman. App., 167.

257 Census Characteristics, *supra* n. 254, Louisiana, Table 172.

258 App., 167.

259 Brief of the Government at 45 n. 21.

260 Census Characteristics, *supra* n. 254, Louisiana, Table 172.

261 App., 167.

prima facie case. In any event, the census statistics are not the basis for the 50 per cent quota. Minority craftsmen with the requisite skills were unavailable in the Gramercy area. The most persuasive evidence of this fact is the institution of the training programs. As Mr. Bowdle stated:

> Q. Now, sir, on a pure economic basis, what would be the cheapest procedure, on a pure cost approach, for obtaining qualified craft employees at the various Kaiser plants?
>
> A. Hire them off the street. If we had adequate supply of craftsmen, candidates coming off the street, that would be the logical way for us to fill our craft jobs, rather than train, because training costs money.[262]

The only other purported evidence of past discrimination offered by the Government is the requirement of Kaiser that craftsmen have prior industrial experience.[263] This requirement may have been illegal, the Government speculates, because prior experience may not have been necessary to perform the craft jobs.[264] However, the Government fails to recognize that prior experience is the essential requirement of being a craftsman.[265] The National Appren-

262 App., 95.

263 Brief of the Government at 46-48.

264 *Id.* at 48 n. 23.

265 See The National Apprenticeship Program (U.S. Dept. of Labor, Employment and Training Admin., Rev. 1976).

ticeship Program of the Department of Labor recognizes that craft occupations are "learned through experience and training on the job, supplemented by related technical instruction."[266] The prior experience requirement on its face was job related and the district court implicitly found this requirement to be a business necessity.[267] The position of the Government can be likened to questioning the requirements that lawyers have a law degree and pass the bar exam or that doctors have a medical degree.[268] Even Judge Wisdom, in asserting that "the requirement of any training for some craft jobs may be illegal," recognized that "this claim would be the most easily refuted by an employer . . . ."[269] Moreover, this assertion of the Government is ironic in this case, where the Government seeks to obtain entry for minority workers on a disproportionate basis into training programs designed to provide the requisite experience. If no experience is necessary, minority workers do not need to enter training programs under a discriminatory quota. Furthermore, the evidence establishes that the prior experience requirement was not the reason for the adoption of the racial quota. Thus, this requirement did not provide the

266 *Id.* at 10.

267 This finding is implicit in the factual finding of no past discrimination. 415 F.Supp. at 764. As Judge Wisdom stated: "The judge simply accepted the statement that prior experience was a business necessity . . . ." 563 F.2d at 232.

268 Relatively fewer minority group members than non-minority members possess these qualifications.

269 563 F.2d at 232.

basis for any asserted reasonable belief in potential Title VII liability.[270]

The Government also makes a token argument that a prima facie case could be based on the disparity between the minority representation in the unskilled work force at the Gramercy plant and the minority ratio in the local labor force.[271] This argument, however, is meritless in light of the consideration of these statistics by the district court and the finding that Kaiser had not discriminated in the past.[272] In addition, although the Government suggests that the "best qualified" hiring policy employed prior to 1969 was potentially illegal under Title VII because of the cited statistical disparity, this disparity arose in large part prior to the passage of Title VII. The Gramercy plant opened in 1957 or 1958;[273] the initial hiring by the company occurred at that time. In light of the 50-50 hiring ratio implemented at the gate since 1969, it is unlikely that any important disparity exists between the minority representation in the work force and the

270 The evidence indicated that, sometime prior to the institution of the 1974 training programs, Kaiser lowered the prior experience requirement for entry into craft jobs from five years to three years. App., 70. The difference in the five year and three year requirements apparently did not change the impact of the prior experience requirement on blacks because Kaiser was still unable to hire trained craftsmen from outside the plant. Only one black craftsman was hired from off the street in the years 1972-74. App., 167.

271 Brief of the Government at 43.

272 415 F.Supp. at 764.

273 App., 71.

minority hiring by Kaiser since the effective date of Title VII.[274] Thus, any statistical case of past discrimination would be weak or nonexistent. The finding of no discrimination by the district court is correct.

3. The 50 per cent quota is not legal as a remedy because none of the persons preferred under the quota were victims of past discrimination by Kaiser.

Although the Government insists on imagining the asserted prima facie cases that Kaiser might have feared had it thought to do so, the Government does not claim that the 50 per cent quota could have been designed to provide individual remedies to minority

274 See *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977), where the Court held that the important statistical evidence relates to hiring practices after the effective date of Title VII. The Court said:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." (Citation omitted).

Id. at 309-10, 97 S.Ct. at 2742-43.

workers for past discrimination. The Government concedes that "the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant."[275] This admission is consistent with the findings of the district court and court of appeals that "none of [the] black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser."[276]

Whatever might be shown by the statistics relating to the Gramercy plant, the minority workers preferred under the 50 per cent quota *were hired* by Kaiser. They were accorded all the benefits granted to unskilled white workers. Their seniority status in bidding for training opportunities was based on the date of hire.[277] The seniority system at Kaiser did not discriminate on the basis of race.[278] Thus, these employees had not been victimized by past employment discrimination by Kaiser.[279]

275 Brief of the Government at 52.

276 415 F.Supp. at 764; 563 F.2d at 224. This point does not appear to have been questioned in the dissent of Judge Wisdom. See 563 F.2d at 235-36.

277 App., 72.

278 App., 72.

279 The Government asserts in a footnote that these employees were "potential" victims of discrimination because they had no prior craft experience and could not apply for craft jobs. This argument assumes that no experience requirement for craft jobs was necessary. Unskilled laborers, under the theory of the Government, should have been placed directly into dangerous and complex jobs involving high electrical voltage, complex machinery and

The decisions of this Court establish that "remedial" preferences are valid only to the extent that they correct for past illegal discrimination.[280] In addition, even these remedies must be adjusted so as not to unduly upset "the legitimate expectations of other employees innocent of any wrongdoing."[281] In *International Brotherhood of Teamsters v. United States*,[282] the Court held that Title VII remedies should be accorded only to individuals who had been victims of past discrimination; the Government's theory that a remedy is sufficient if it has "a fair degree of specificity" was rejected.[283] The Court held:

> While it may be true that many of the non-applicant employees desired and would have applied for linedriver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand.[284]

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instrumentation, industrial chemicals and sophisticated tolerances and calibrations. In addition, the "potential" victim theory ignores the fact that the white workers at the plant who were disadvantaged by the racial quota were also prevented from applying for craft jobs by the prior experience requirement. The "potential" victim theory is a far cry from the test adopted by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 *et seq.*, 97 S.Ct. 1843, 1868 *et seq.* (1977).

280 *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977).

281 *Id.* at 372, 97 S.Ct. at 1873.

282 431 U.S. 324, 97 S.Ct. 1843 (1977).

283 *Id.* at 368, 97 S.Ct. at 1871.

284 *Id.* at 371, 97 S.Ct. at 1873.

The Court specifically required that, to fashion a remedy, the district court identify the "actual victims of the company's discriminatory practices."[285] The equitable power of the district court apparently was held to encompass returning identified victims of discrimination to their "rightful place,"[286] but only after a balancing of the remedy with the legitimate interests of innocent employees.[287]

The holding in the *International Brotherhood of Teamsters* case is supported by the decision of the Court in *Franks v. Bowman Transportation Co.*[288] In *Franks* the Court held that seniority relief could be provided to "identifiable victims of racial discrimination. . . ."[289] The applicable principle in fashioning a remedy is to require that " 'persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.' "[290] The Court did not approve class "remedies" based on race[291]

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285 *Id.* at 371-72, 97 S.Ct. at 1873.

286 *Id.* at 372, 97 S.Ct. at 1873.

287 *Id.*

288 424 U.S. 747, 96 S.Ct. 1251 (1976).

289 *Id.* at 774, 96 S.Ct. at 1269.

290 *Id.* at 764, 96 S.Ct. at 1264.

291 See also the statement of Mr. Justice Powell in *Regents of the University of California v. Bakke*, ___ U.S. ___, ___, 98 S.Ct. 2733, 2755 (1978); "But we have never approved preferential classifications in the absence of proven constitutional or statutory violations."

The decisions limiting remedies to individual victims of past discrimination are sound. The purpose of the prohibition against race discrimination is to protect individuals from the effects of stereotyped attitudes and prejudices about racial groups. Indeed, the purpose of Title VII was to "give people the opportunity to be hired on the basis of merit. . . ."[292] In addition, a preference favorable to a class may have a tenuous relationship to assumed past discrimination, but this factor is outweighed by the known and overt discrimination against those disadvantaged by the preference. Furthermore, in the absence of past discrimination against an individual, a racial preference in favor of that individual is itself a violation of Title VII. Therefore, the racial quota is invalid because it does not remedy any prior discrimination against the preferred minority employees.

Because the racial quota is not limited to individual victims of past discrimination, it is not an "[a]ppropriate"[293] or "[r]easonable"[294] remedy for "the [p]roblem"[295] as claimed by Kaiser and the Government. A class-wide program of preferences does not necessarily remedy any past discrimination against individuals. The administrative inconvenience of identifying individual victims of discrimination does not

292 110 Cong. Rec. at 6549.

293 Brief of the Government at 48.

294 Brief of Kaiser at 51.

295 *Id.*

justify broad racial preferences that disadvantage innocent employees.[296] Class preferences do not insulate employers from Title VII actions brought by actual victims of past discrimination. These parties may sue even if "remedial" preferences have been granted to others of their race. Thus, the racial quota is not reasonable.

Nor is the racial selection criterion valid because, under the training programs, whites "gained an opportunity to qualify as craft workers."[297] Regardless of the new opportunities provided under the training programs, unequal treatment in these programs is expressly prohibited by Section 703(d) of Title VII.[298] Discrimination against minority workers in training programs would not be valid simply because some of them got new opportunities. Therefore, discrimination against whites should not be permitted on this ground.

No past discrimination existed at the Gramercy plant. The 50 per cent quota is not remedial. The discrimination against white workers is not justified. Therefore, the racial quota is invalid.

296 In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371, 97 S.Ct., 1843, 1873 (1977), the Court required the identification of individual victims as a prerequisite to the issuance of remedies, although it noted that "[t]he task . . . will not be a simple one."

297 Brief of Kaiser at 58.

298 42 U.S.C. §2000e-2(d) (1976).

B. *The Legislative History of Title VII Does Not Support the Inference of USWA that Racial Preferences for Minorities Are Allowed, Though Not Required, Under the Statute.*

USWA recognizes that the 50 per cent quota was not instituted to correct for past discrimination, but instead was intended to achieve a desired minority ratio in the crafts. The union faces up to the issue in this case: whether a racial preference for minority workers may voluntarily be instituted by private parties. However, the legislative argument offered by USWA in support of the theory that voluntary preferences for minorities may be implemented has no merit. This theory is inconsistent with the express language of the statute, contrary to the decisions of this Court, and incompatible with the legislative history.

The theory that quotas in favor of minority workers are permissible is based solely on inference. USWA finds numerous passages in the legislative history stating that employers may not be required to institute racial preferences to eliminate a racial imbalance.[299] It infers, then, that racial preferences are permitted: "The natural inference is that an employer or union is *permitted* to do so."[300] However, there is no basis for this inference.

Title VII makes it an unlawful employment practice to discriminate against *any individual* on the basis of race. Section 703(a)(1) of Title VII states that it shall be unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ."[301] Section 703(d) makes it unlawful "to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training."[302] A preference to minority workers embodies discrimination against non-minority employees. This discrimination is expressly prohibited by the language of the statute, which controls over negative inferences drawn from the legislative history by USWA.

The inference of USWA is also invalid in light of the holdings of this Court. In *Griggs v. Duke Power Co.*,[303] the Court made it clear that an inference may not be drawn from the statute that preferences for minority groups are permissible. It stated: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[304] In *McDonald v. Sante Fe Trail Transportation Co.*,[305] the Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the allegedly preferred employee] white."[306] As Title VII

299 Brief of USWA at 26-66.

300 *Id.* at 15.

301 42 U.S.C. §2000e-2(a)(1) (1976).

302 42 U.S.C. §2000e-2(d) (1976).

303 401 U.S. 424, 91 S.Ct. 849 (1971).

304 *Id.* at 431, 91 S.Ct. at 853.

305 427 U.S. 273, 96 S.Ct. 2574 (1976).

306 *Id.* at 280, 96 S.Ct. at 2579.

would not permit a racial quota in favor of whites to achieve a desired racial ratio in craft jobs, no inference is permissible that a quota to achieve this goal may be used in favor of minority workers.

The inference of USWA is also contrary to the legislative history of Title VII. In its own brief USWA cites numerous instances of statements that racial quotas of any kind are discriminatory.[307] For instance, Sens. Clark and Clifford P. Case, the bipartisan "captains" for Title VII,[308] introduced an interpretive memorandum stating that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race."[309] Sen. Williams stated: "[T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."[310] The argument of USWA, based solely on inference, cannot overcome specific statements of legislative intent.[311] Therefore, the theory of USWA should be rejected.

307 E.g., Brief of USWA at 43, 43-44, 52.

308 *Id.* at 41.

309 *Id.* at 43; 110 Cong. Rec. at 7213.

310 *Id.* at 52, 110 Cong. Rec. at 8921.

311 The distinction drawn by USWA between statements made prior to and after the introduction of Section 703(j) by Sen. Everett M. Kirksen is meritless. As USWA recognizes, Brief of USWA at 60, Sen. Humphrey stated that "[t]his subsection does not represent any change in the substance of the title . . . ." 110 Cong. Rec. at 12723.

C. *The Discrimination Against White Workers Is Not Validated By Executive Order 11246 or the Affirmative Action Guidelines of the EEOC.*

In a further attempt to support the racial quota for admission into training programs, Kaiser and the Government argue that this program is authorized under Executive Order 11246 and the Government contends that the racial quota is consistent with the affirmative action guidelines of the EEOC.[312] However, these contentions are invalid because the 50 per cent quota nevertheless violates Title VII.

The court of appeals held that the racial quota could not be valid under Executive Order 11246 because it is invalid under Title VII. In the event of a conflict between a statute and an executive order, the statute prevails.[313] The court of appeals stated:

> Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-

312 Brief of Kaiser at 30 *et seq.* Brief of the Government at 54 *et seq.*, 40-42.

313 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952).

> job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall before this direct congressional prohibition.[314]

The Government has conceded this point, as it "accept[s] the premise that the Executive Order cannot override Title VII if the two conflict. . . ."[315] Kaiser does not question this principle.

In light of the concession that Title VII prevails in the event of a conflict with the executive order, the asserted authorization of the racial quota by the executive order is irrelevant. The racial quota is valid under the statute or it is not. If it is a violation of Title VII, it cannot be authorized by the executive order.[316] In this case, the racial quota is invalid under Title VII because it discriminates against white workers on the basis of race.[317]

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314 563 F.2d at 227.

315 Petition for a Writ of Certiorari in No. 78-436 at 16.

316 If the OFCC regulations are read to require the establishment of "goals" and "timetables" only when "underutilization" is found in designated jobs, and the utilization is determined solely on the basis of the available minority workers with the requisite skills in the local labor force, it is doubtful that underutilization existed in this case. 41 C.F.R. 60-2.11. However, the regulations require the consideration of other factors in the utilization analysis. *Id.*

317 The reliance on authorities approving "affirmative action," such as *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir., 1975), *cert. denied,* 404 U.S. 854 (1971), and *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680 (7th Cir., 1972), is misplaced. These cases on their face merely approve "goals" established pursuant to executive orders that were balanced so as *not* to discriminate against whites. In *Ogilvie,* the court specifically held that the Ogilvie Plan did not "discriminate against white persons." *Id.* at 686. In the *Contractors Association* case, the federal order at issue precluded reverse discrimination. It stated:

> This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator for the Office of Contract Compliance of the U.S. Department of Labor in order that appropriate sanction proceedings may be instituted.
>
> 442 F.2d at 164.

The reliance of the Government on the affirmative action guidelines of the EEOC is also misplaced.[318] The guidelines are not entitled to "great deference" under the standard set out in *Skidmore v. Swift & Co.*[319] and approved in *General Electric Co. v. Gilbert.*[320] The Court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which

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318 Brief of the Government at 40-42.

319 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944).

320 429 U.S. 125, 141-42, 97 S.Ct. 401, 411 (1976).

give it power to persuade, if lacking power to control.[321]

In this case, as in *Gilbert*, "[t]he EEOC guideline in question does not fare well under these standards."[322] The guidelines were not issued until December 11, 1978, or 14 years after the passage of Title VII. Thus, they do not have the persuasiveness of a contemporaneous administrative interpretation of the statute.[323] Moreover, to the extent that the guidelines authorize preferences to members of minority groups to eliminate racial imbalance, they are inconsistent with the express language of the statute and the decisions of this Court.[324] In addition, the guidelines conflict with previous administrative decisions of the EEOC.[325]

321 323 U.S. 134, 140, 65 S.Ct. 161, 164.

322 429 U.S. at 142, 97 S.Ct. at 411.

323 *Id.*

324 42 U.S.C. §§2000e-2(a), 2000e-2(d); e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971).

325 E.g., EEOC Decision No. 74-106 (1974), CCH Employment Practices Guide ¶ 6427 (In implementing affirmative action, "[r]espondent may not violate Section 703(j) of Title VII which proscribes 'preferential treatment.' "). EEOC Decision No. 75-268, CCH Employment Practices Guide ¶ 6452 (1975) (Exclusions of non-minority candidates "clearly run afoul of Section 703(j) of the Act as well as Title VII's general concern with providing equal job opportunities to all on the basis of individual capabilities."). Both of these decisions cited and relied on *Griggs v. Duke Power Co.*, 401 U.S. 429 (1971) and *Commonwealth of Pennsylvania v. O'Neil*, 5 EPD ¶ 7974 (3d Cir., 1972) affirmed in part, reversed in part on rehearing *en banc*, 473 F.2d 1029 (3d Cir., 1973), where the Third Circuit stated:

> Opening the doors long shut to minorities is imperative, but in so doing we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open these doors in the first place.

Id.

Finally, the guidelines were issued after the EEOC entered this litigation and were designed to counter the impact of "the *Weber* decision."[326] They therefore could not be regarded as the interpretation of an objective party. Thus, the guidelines are entitled to little deference in this case.

D. *A Policy Permitting the Advancement of Minority Workers at the Expense of Whites Could Have Adverse and Unmanageable Consequences.*

The standards of review proposed by the petitioners for cases involving preferences to minorities would permit widespread employment discrimination in the United States. USWA would have the Court permit private parties to "voluntarily" establish preferences for minorities at any time to eliminate racial imbalance.[327] The Government advocates a standard that would permit reverse racial quotas in the event of "apparent" past discrimination, but this test in practice requires only that the percentage of minority workers employed in designated jobs be less than the percentage of minority employees in the local labor force.[328] The percentage disparity, under the theory of the Government, would be a prima facie case of past discrimination and would permit the enactment of race preferences.[329]

326 Supplementary Information, Guidelines on Affirmative Action, CCH Employment Practices Guide ¶ 4011.11.

327 Brief of USWA at 14-23.

328 Brief of the Government at 35-42.

329 *Id.* at 40 *et seq.*

This theory is embodied in the OFCC regulations and the EEOC affirmative action guidelines.[330] Kaiser suggests a "zone of reasonableness" standard that would permit racial preferences whenever the employer has reason to believe that society has discriminated against a particular minority group.[331] All of these standards have the benefit of advancing the economic standing of minority classes, but at the cost of damaging the employment expectations of innocent non-minority workers. If any of the proposed standards were adopted by the Court, the adverse consequences could be severe.

The most important damage that would result from a policy to allow racial preferences is the harm to innocent individuals.[332] The white employees in this case acquired their seniority rights only after years of service to Kaiser and membership in USWA. These parties are presumably innocent of any wrongdoing against blacks or other minority groups. Yet under each of the legal standards advocated by the petitioners, these individuals would bear virtually the entire cost of advancing minority groups. This result is ironic because the white employees who are asked to bear this cost are part of the unskilled labor force at Kaiser and occupy the same status as the preferred minority workers. The application of the 50 per cent quota does not eliminate

330 41 C.F.R. Part 60-2; 29 C.F.R. §1608.4.

331 Brief of Kaiser at 45, 39-42.

332 See *Regents of the University of California v. Bakke*, ___ U.S. ___, ___, 98 S.Ct. 2733, 2753 (1978) (Powell, J.).

any economic disparity between these individuals, but instead advances the minority workers at the expense of the whites.

A policy to permit racial preferences to advance the economic standing of minority groups may also kindle racial prejudice.[333] An individual who suffers the loss of seniority rights or employment opportunities solely on the ground of race will be hard pressed to avoid racial resentment. Economic deprivation is felt just as strongly by non-minority employees as by minority workers. In this case, the evidence at the trial suggested that the 50 per cent quota adversely affected the racial attitudes at the plant. Mr. Weber, who was familiar with the attitudes of workers at the plant because of his position as chairman of the union grievance committee,[334] stated that the "racial relations of the white workers toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves."[335] This result is the natural effect of race discrimination that deprives employees of their economic expectations. A policy to permit race preferences can only foster racial disharmony.

333 See *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 1014 (1977) (Brennan, J., concurring).

334 App., 35.

335 App., 36.

The standards that would allow preferential quotas would also tend to enhance racial stereotypes. "[S]uch a policy may imply to some the recipients' inferiority and special need for protection."[336] Non-minority employees who observe the operation of a racial quota imposed under government regulations requiring preferences to minority classes may conclude that these groups are special wards of the government. Based on the OFCC regulations and EEOC affirmative action guidelines, this conclusion would appear warranted. White employees might also infer incorrectly, however, that the government requirement of preferences is the only means by which minority individuals advance. Thus, a policy of preferential treatment will carry the negative effect of stigmatizing minority workers by reinforcing attitudes that these employees are incapable of advancing on their own merit.

The reliance on the Government's statistical requirements in the hiring or promotion of workers may diminish the incentive of workers to be productive.[337] The free enterprise system depends in part on encouraging employee productivity through incentives. Workers who produce a greater output than their peers traditionally could expect to be rewarded for their efforts through increases in pay or promotions. In this case, advancement is not based strictly on individual achievement, but the seniority criterion does reward the worker for his length of service to the company. Incentives based on length of service should also enhance productivity and efficiency. The denial of this job benefit, on the other hand, diminishes loyalty to the employer and the desire of the employee to perform his tasks efficiently. As Mr. Weber stated:

> The quota system, again, has affected the attitudes of the workers towards productivity in a very bad way because of the fact that it takes away from the initiative of the individual employee to do more, to do one step further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company. So, thus, his attitude does affect productivity in a bad way.[338]

In addition, the disharmony fostered by racial classifications may tend to diminish the efficiency of workers.

The approval of policies to prefer minority workers may also produce reactions in society that are harmful and unmanageable. First, if government regulations

336 *United Jewish Organizations v. Carey*, 430 U.S. 144, 174, 97 S.Ct. 966, 1014 (1977) (Brennan, J., concurring).

337 Note, *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1115 (1971).

338 App., 37-38.

that disadvantage white workers on a broad scale are approved, this decision is almost certain to produce a political reaction. With their economic interests at stake, white employees could be expected to coalesce in a political movement designed to recapture equal employment opportunities. These employees conceivably could exercise considerable political power. Politicians who rise to prominence as part of this movement may take actions that in fact achieve more than equality for whites and cause concomitant harm to minorities.[339] In addition, a political movement to bring equal opportunity to white workers is likely to damage the objectives of the equal rights movement by encouraging racial voting patterns and enhancing the importance of racial issues in elections.

Second, the standards proposed by the petitioners may make it more difficult for the courts to protect minorities at some future time when their interests may not be protected by public officials. These standards would require the courts to permit racial classifications when the employer has a reasonable belief that there was past disparate treatment of a specific class. The operation of preferential programs will provide a documented history of disparate treat-

339 This prediction may involve speculation, but it is nevertheless possible. The current posture of the Government in effect is an overreaction in which the Government seeks to achieve more than equality for minority workers.

ment of white workers.[340] Thus, employers and public officials would be permitted in the future to grant preferences to whites to "remedy" past discrimination. Moreover, because Kaiser and the Government propose the abandonment of any standard for the identification of victims of discrimination as a prerequisite for a "remedy," the disparate treatment of some whites could serve as a justification for the advancement of the entire class at the expense of minorities. This effect would not be desirable, yet it would be required under an even-handed application of the standards proposed by Kaiser and the Government.

Our society is best served by the principle of equality. This standard is accepted by the populace and capable of principled application. In addition, it preserves as fundamental the traditional focus on individual merit rather than race or class concepts. While it may appear attractive to depart from this principle in favor of temporary inequality to achieve the statistical parity of all classes, this action could have adverse consequences. Therefore, the proposals of the petitioners should be rejected.

CONCLUSION

The 50 per cent quota of Kaiser and USWA discriminates against non-minority employees. This

340 We know of no standards used by the Government in selecting the currently recognized minority groups. These groups hardly encompass all classes that have suffered discrimination on grounds of race, color, religion or national origin. Moreover, as the designated classes, including females, are more than a majority of the population, white males could validly be deemed a "minority group."

employment discrimination is illegal under Title VII. The racial quota is not designed to correct for past discrimination, but instead seeks generally to advance certain classes of workers because of assumptions about their past treatment by society. The request for the approval of preferential treatment of classes based on race, without reference to personal merit or seniority or previous individual history, is an approach that relies on the collectivized, stereotyped factors that Title VII and the equal protection clause instruct us to ignore. It may be attractive and arguably benign for government planners or corporation and union executives to decree a societal transformation through preferences based on race, but this new discrimination nonetheless has its own victims, no better off than the preferred class, who are called upon to endure the curtailment of opportunity, suffer the economic effects of discrimination, and stomach the elimination of merit as a ground of advancement. This result should not be approved by the Court.

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Nos. 78-432, 78-435, 78-436

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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Petitioner,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
v.
BRIAN F. WEBER,
Petitioner,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
v.
BRIAN F. WEBER, ET AL.,
Petitioners.
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REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC

ARGUMENT

Ironically, both of our fellow petitioners in this Court argue for a construction of Title VII which would invalidate "affirmative" action as the United Steelworkers of America ("USWA") understands the term (and would only permit quotas to end a racial imbalance as "defensive" or "remedial" action). As the Government puts it, Title VII does not "permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act" (Govt. Br. 29), and accordingly privately adopted quotas should be "subject to . . . scrutiny, so as to ensure that the programs are reasonably tailored to the apparent violation that they are designed to remedy" (*id.* at 40; see also, *id.* at 17, 19, 21). In the Company's words, Title VII would not permit employers to adopt quotas to eliminate racial imbalance "without cause or for purely altruistic reasons" (Co. Br. 32), but only to "remedy identified discrimination" (*id.* at 30, 32).

We show in Part II of this reply that the Government and the Company do not derive these concessions from any

analysis of the governing legislative materials. Rather, each constructs an argument from whole cloth which is contrary not only to the legislative materials but, as we show in Part III, to logic and common-sense.[1] In the course of Part II, we also reply to the short argument Respondent has addressed to our opening brief. Before doing so, and having read with interest the assessments offered by the myriad parties and *amici curiae* as to the impetus for the Union's entering into the agreement struck down by the courts below, we think it appropriate to begin with a statement in that regard of our own.

[1] The Government is in error in suggesting that USWA's position in the Fifth Circuit can be equated with the Government's position in this Court. (Govt. Reply Br. 6-7).

First, USWA's brief to the court below began by noting that § 703(j) on its face appears to validate quota programs to eliminate racial imbalance regardless of the cause of the imbalance and that *McDonald* v. *Sante Fe Transportation Co.*, 427 U.S. 273 (1976), does not preclude such a reading of the statute. (Brief for Defendant-Appellant USWA in C.A. 5, No. 76-3266 at 13-14). Thus the Union did not make the critical concession the Government makes here.

Second, in the Fifth Circuit, USWA did go on to develop an alternative analysis derived from the numerous Fifth Circuit decisions approving broad quota remedies. USWA expressly noted its doubts as to the correctness of those decisions (*id.* at 21), observing that "the tide appears to be turning against remedies which extend priorities to employees who were not personal victims of discrimination" (*id.* at 25); indeed, USWA predicted that the Fifth Circuit's decisions might no longer be viable after this Court decided *Teamsters* v. *United States*, 431 U. 342 (1977), (which was then pending on a grant of certiorari). But taking the circuit law as it stood, USWA agreed that private parties in the Fifth Circuit surely were entitled to adopt voluntarily those remedies which the Fifth Circuit would impose upon them.

Consistent with the approach just outlined, USWA stated below that the "ultimate question" presented was

> "[T]o the extent that the 1974 agreement enables junior black employees to secure training vacancies ahead of more senior white employees, does the agreement discriminate against whites because of their race in violation of Title VII?" (USWA's brief in C.A. 5, No. 76-3266 at p. 2).

What the Government in its Reply Brief at (p. 6) characterizes as "the question" the Union presented below was in fact one of five "subsidiary questions." Before the Fifth Circuit decided this case, this Court decided *Teamsters*, and as USWA had predicted, declared that the "make whole" remedial scheme of § 706(g) is addressed to "identifiable victims." And the court below in fact reached and decided this case on the basis of § 703(j). Thus, the question presented to *this* Court is the one stated at p. 1 of our opening brief.

I.

In 1974, USWA embarked upon a nationwide program to eliminate a form of racial segregation which existed throughout the industries whose employees USWA represents: the near absence of blacks from craft jobs. The Union did not undertake this program in response to any past discrimination by USWA; indeed, as the record of this case exemplifies, the employers in these industries have historically had unilateral control over the selection of craftsmen, and USWA had sought for years, albeit unsuccessfully, a negotiated selection system which would have opened these jobs to blacks.[2] Significantly, although the parties debate whether Kaiser might conceivably have discriminated in the past in filling craft jobs (Govt. Br. 42-48; Co. Br. 47, n. 122; Resp. Br. 58-70), no party suggests that USWA was culpable in any respect.

Nor was the program undertaken solely in response to past discrimination by the employers with whom USWA deals. Without studying the specific causes for the absence of black craftsmen at given plants, USWA acted on the

[2] Well before 1974, USWA had persuaded most of the major employers with which it deals to institute in-plant craft training programs open to all employees based on seniority. Kaiser was an exception in that until 1974 it continued to select its craftsmen "off the street". For years, USWA had urged Kaiser to establish in-plant training programs which would have enabled the incumbent production workers—white and black—to become qualified for craft positions (Un. Br. 6-12).

assumption that the causes were multiple and might well differ from employer to employer, plant to plant, and geographic area to geographic area—often, as the courts below found was the case here, tracing back well beyond the conduct of the employer to external societal factors.

USWA's advocacy of the affirmative quota selection plan thus stemmed not from any concern that the union might be legally vulnerable for the existing segregation in craft jobs, nor that the employers with which it deals were invariably vulnerable. Rather, USWA acted to end that situation regardless of its cause.[3] Respondent's charge that USWA's actions reflect a desire "to help uplift the employment status of minority workers as a class" (Resp. Br. 14) is justified, but it is not accurate to characterize those actions as "altruistic" (cf. Co. Br. 32). Rather, USWA acted on principles which properly underlie all actions of unions in their representational status: maximizing the collective interests of the employees they represent. Regardless of the cause, the fact of in-plant racial segregation, superimposed upon two centuries of endemic racial discrimination at all levels of society, fosters a *perception* of present racial injustice which is injurious to employee morale and union solidarity. Of course, USWA recognized that undertaking a quota program to eliminate that segregation might create short-term strains of the type evidenced by this lawsuit (ameliorated in the particular circumstances here because the program created opportunities for both black and white USWA members which neither would have en-

[3] The Union's actions thus coincided with the sentiment expressed by Senator Humphrey in his principal statement in support of the bill, 110 Cong. Rec. 6548.

> "It profits little to attempt to calculate how much the disparity in employment opportunities for whites or for nonwhites is ascribable to outright discrimination in employment, how much to discrimination in education, how much to discrimination in the present, and how much to the legacy of discrimination in the past. The problem is before us and the solution calls for action, not explanations."

joyed otherwise). But it was USWA's assessment that the long-term gains from a *temporary* program of this sort would outweigh any short-term costs.

We italicize the word "temporary" to assure that there is no misunderstanding as to the nature of the program at issue. Respondent's brief states that the 1974 agreement mandates quota selection even after the existing imbalance has been eliminated (Resp. Br. 4). But the 1974 agreement expressly provides that this procedure shall apply only "until the goal is reached" (App. 137, 145, 168). Thus the program is addressed to *eliminating an existing racial imbalance,* not to establishing racial balance as a permanent criterion.[4] What is at stake here is the legality of this program and not the legality of a program which establishes a racial quota as a permanent selection criterion.

Perhaps other institutions would have struck the balance differently; but it is USWA's position in this case that Congress left to the parties in collective bargaining the option to affirmatively attack existing patterns of segregation, and did not take from them the freedom to do so which they indisputably enjoyed prior to 1964.

II.

Because the question presented is the meaning of a statute, we continue to believe—contrary to those who have sought out other sources of possible enlightenment—that the answer is to be found through a close reading of the language and the legislative history of that statute. The Company, the Government, and many of the *amici curiae,* ignore these primary sources and construct their respective

[4] Respondent's contrary construction is based exclusively upon the testimony of Dennis English, the Company's superintendent of industrial relations at the Gramercy plant (App. 69); but Mr. English had no part in the negotiation of the 1974 agreement (App. 64-66, 83-84). Suffice it to say that the Union does not agree with this construction, and that the language of the agreement does not support it.

arguments on the basis of their conceptions of the "right" rather than on Congress' conception embodied in Title VII. This is particularly true of our co-petitioners' concession that "affirmative" quota programs designed to end racial segregation in a workforce violate Title VII. In making that concession, the Government offers no reason why the inference of § 703(j) that such programs are permissible should be rejected, nor does it cite any legislative history necessitating its concession. Instead it argues that *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) requires rejection of our position. (Govt. Br. 21). But as we showed in our opening brief (Un. Br. 23), the Court "emphasize[d]" in *McDonald* that it was not passing upon the "permissibility" of affirmative action programs "whether judicially required or otherwise prompted" (427 U.S. at 281, n. 8). And, the Company's 62 page brief does not even stop to consider the significance of § 703(j) or to cite a single word of the 1964 legislative history.

The repeated assertion of the other parties and many of the *amici curiae* that the 1964 legislative history provides little guidance on the question of the validity under Title VII of private quota programs to eliminate racial imbalance, is refuted by the wealth of legislative materials from the 1964 debates which bear on this question cited and discussed at Un. Br. 26-74. No party or *amicus curiae* has submitted any significant additional legislative materials as to the 1964 Congress' intent in enacting § 703.[5]

[5] The only argument respecting Congressional intent which was not fully anticipated in our opening brief is that proffered in the Amicus Curiae Brief of the California Correctional Officers Association: that, as § 703(i) expressly authorizes "preferential treatment" by "any business or enterprise on or near an Indian reservation . . . [in favor of] and individual because he is an Indian living on or near a reservation," and as Congress provided no other explicit authorization for preferences, an inference must be drawn that Congress intended to permit no other preferences. But this overlooks the quite different problem addressed in § 703(i). The preferences which Congress there authorized were not to eliminate imbalances under which Indians then suffered; on the contrary, Indians on or near reservations historically had been *favored* by the preferences there described, and the purpose of § 703(i) was to assure that that favored treatment could be continued, even to the point of permitting businesses on or near an Indian reservation to hire their entire workforce from Indians on or near that reservation. *Morton* v. *Mancari*, 417 U.S. 535 (1974). As we recognized in our opening brief (Un. Br. 20, and note 21), Congress intended its prohibitions against "discrimination" to reach practices which individuously favor one race at the expense of others even when whites are the victims, and but for § 703(i), these historical preferences for Indians would have fallen within that prohibition. The fact that Congress chose to include a special provision to enable a preference *perpetuating* racial imbalance hardly carries with it an inference that Congress would have thought it necessary to include a special provision in order to enable preferences *eliminating* imbalance.

There were, as we acknowledged, a few statements in the 1964 debates by liberals in the Senate, uttered prior to the addition of § 703(j), which could be understood to express an antipathy to quotas in any form, including privately-adopted quotas, and it is upon these statements, exclusively, that Respondent relies (Resp. Br. 78). But as we explained, to the extent these statements might be read as disapproving programs such as the one negotiated here,[6] they were not in the mainstream of the philosophy which guided Congress in shaping Title VII.

Respondent and our co-petitioners see the issue presented simply as how to reconcile two competing interests: the interest of black employees in securing jobs previous denied to blacks; and the interest of white employees in non-discriminatory treatment. As we showed in our opening brief, however, the 1964 Congress was concerned as well with a

[6] As stated in our brief (Un. Br. at 83-84), there is considerable reason to question whether these Senators would have disapproved the quota negotiated here—a quota which would furnish blacks the accelerated training which these Senators recognized as indispensable if Title VII is to achieve its purpose of eliminating the employment disadvantage suffered by blacks.

third interest: the preservation of management prerogatives and union freedoms to the maximum extent consistent with eradicating invidious discrimination. The accommodation of these interests was a judgment in favor of legislative restraint: quotas to eliminate racial imbalance were neither required nor forbidden. That resolution rested both on a recognition of the intrinsic difficulty, or at least the controversial nature, of legislating distributive justice, and on the limitist philosophy of government of the legislators holding the balance of power. Thus, the key Republican sponsors in the House made clear that "The Civil Rights Bill . . . does not in any way *require, reward,* or *encourage* . . . racial quotas or preferences in either private or public employment of individuals" (110 Cong. Rec. 6565, emphasis added). As one of these principal sponsors, Representative McGregor, explained moments before the final vote (110 Cong. Rec. 15893, emphasis added):

> "*Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.*
>
> "Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. *There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues* largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." (emphasis added)

These expressions, as we demonstrated in our opening brief, most clearly state the judgment of Congress in enacting Title VII in 1964—a judgment manifested in § 703(j) by the phrase shall not "require" rather than shall not "permit".

Nothing in any brief diminishes the force of these legislative materials. There is considerable discussion in the briefs of the other parties, and of many *amici curiae,* about Congress' post-1964 deliberations and actions.[7] But whatever the significance of those subsequent events to the question whether the Government can *impose* quotas—a question which the Court is not called upon to decide in the instant case (see Un. Br. at 76-83)—no-one suggests that Congress has, subsequent to 1964, evinced a hostility to privately adopted quotas to eliminate racial imbalance. Accordingly, if we are correct that Congress did not outlaw such quotas in 1964, nothing which has happened since could alter the construction of Title VII which we urge upon the Court.

III.

The justifications offered by our co-petitioners for a narrower construction of the right of private parties to adopt such quota selection programs are neither logical nor con-

[7] In *Teamsters* v. *United States,* 431 U.S. 324, 354 n. 39, the Court noted:

> the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

Teamsters thus recognizes that in Title VII cases, as in statutory cases generally (see, e.g., *Zuber* v. *Allen,* 396 U.S. 168, 185-86; *United States* v. *Wise,* 370 U.S. 405, 411-414; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 47-48), the meaning of legislation is to be determined from its language and legislative history rather than the uncertain inferences to be drawn from a subsequent Congress' failure to adopt proposed clarifying amendments. Guided by this principle which rests on the understanding that the law-making initiative is Congress' alone, in our opening brief we concentrated on the "intent of the Congress that enacted § 703 * * * in 1964," and reviewed the legislative history of the 1972 EEO Act only to show that it did not alter § 703 in any respect. (See pp. 74-76 of that brief).

sistent with the principles which guided Congress in Title VII.

The Government, Company, and numerous *amici curiae*, take as a given—without as we have already stated any support in the legislative history—that privately adopted quotas to eliminate segregation in the workforce violate the ban on employment discrimination in Title VII. Because they begin at that point, they find it necessary to construct rationales which would carve out from the area of prohibition some more limited zone of permissible private quota programs. As we explained in our opening brief (Un. Br. 78, n. 166), the positions urged by the Government and the Company "might jeopardize existing programs that USWA has negotiated throughout the steel, aluminum and can industries." Accordingly, we are compelled to note that having conceded away the direct route to upholding the program here at issue, they offer as substitutes convoluted routes which are without analytical or legislative support.

(1) *The Government*

The Government's alternative route is to argue that private parties may employ quotas as a "remedy" for their own real or "apparent" past discrimination. (Govt. Br. 35-42). Suffice it to say that, as we showed in our opening brief at 76-82, the lines which the Government attempts to draw are unconnected to any judgment made by Congress in shaping Title VII—indeed, are in conflict with the judgments which Congress *did* make. To that demonstration, we add here that even considered on its own terms the Government's rationale does not bear analysis. The bottom line of its argument is that employers and unions confronting the prospect that they may have discriminated in the past or may appear to have so discriminated, should be permitted to resolve their potential Title VII difficulties by adopting a "remedial" quota. But, in truth, such quotas neither remedy any discrimination that might have occurred nor resolve potential Title VII liabilities of the employer or union. Quota programs allocate employment opportunities

on the basis of race, not on the basis of status as a victim of past discrimination. By definition, such programs address the phenomenon of racial imbalance—the very phenomenon the Government says private parties may not address—they are not addressed to "making whole" the victims of past discrimination. The victims of the discrimination are by definition not the beneficiaries of the quota, except possibly by coincidence; and, the quota cannot cut off the rights of anyone who *was* a victim. If in fact Kaiser has discriminated against blacks in hiring craftsmen, the victims of that discrimination have available to them—and have had available to them for the past fourteen years—all the remedies provided by Title VII, and those remedies are wholly unaffected by the Kaiser-USWA quota selection program. Kaiser could not avoid its liability to an actual discriminatee by providing a quota preference to another person of the same race; its potential Title VII vulnerability, if any there be, is not diminished by the adoption of a quota selection program.[8]

Thus, the multi-sided debate, incidental to the Government's theory, as to whether, contrary to the findings of the courts below, Kaiser has engaged in prior discrimination

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[8] While not relieving the employer of any potential liability with respect to aggrieved black employees, the adoption of an affirmative quota program would, on the Government's understanding of § 703, open the employer to potential liability to white employees. The Government asserts that the employer might have refuge from claims by whites by virtue of the Equal Employment Opportunity Commission's (EEOC's) Guidelines which set "standards for the approval of voluntary affirmative action programs under Section 713(b)(1) . . ." (Govt. Br. 40). But even assuming refuge may be established in that fashion, careful reading of those Guidelines reveals that their shelter would extend only to those employers who, when confronted with a charge of discrimination by whites, are willing to come forward with evidence which could be used by the EEOC to institute or prosecute a charge against the employer for discriminating against blacks. See Guidelines, §§ 1608.1(d), 1608.2, and 1608.11.

of one type or another against blacks, or whether there is a *prima facie* showing of such discrimination on this record, is beside the point. Proof that Kaiser has or has not discriminated against blacks belongs in a case where it is contended that one or more black persons are the victims of such discrimination and should therefore be granted a remedy. That proof has nothing to do with a quota program not designed in the first place to remedy any such discrimination. The connection which these various briefs make between the two issues is without any analytical foundation.[9]

Further, we cannot help but observe that the Government's argument, by hinging the right of private parties to adopt quota programs on a showing of real or apparent past discrimination, would make culprits of forward-looking employers and unions while protecting only past sinners. Major segments of American industry have already adopted quota selection programs, unaware of the limitations the Government has lately suggested apply to their right to do so. Only by fabricating real or apparent cases against themselves can they, under the Government's theory, justify what they have already done. And employers and unions that could not show themselves to have been real or apparent past sinners would be precluded from establishing new affirmative action programs unless they were prepared first to commit some real or apparent sins. When such results flow from a concocted rationale rather than a Congressional judgment they are particularly intolerable. Congress did not draw the lines the Government presses upon this Court.

The Congress which enacted Title VII understood that the racial discrimination pervading all facets of American

[9] The same fallacy inheres in the assertion in numerous *amicus curiae* briefs that somehow an indispensible party is missing in this case: the blacks who have been victims of Kaiser's discrimination. As stated in the text, if there be any such victims, the USWA-Kaiser quota program does not affect in any respect their right to pursue their remedies under Title VII.

society—not simply the workplace itself—accounted for the present disadvantage suffered by blacks in employment.[10] While Title VII *mandated* only cures for *employment* discrimination, it is no violation of Congressional intent for employers and unions to address a principal consequence of "external" discrimination—the *de facto* segregation of their workforces. Congress has not condemned the private acceleration of an end to the legacy of the ugliest page in our Nation's history; and employers and unions who are anxious to undertake the task should not be required to manufacture or hypothesize pretextual past sins of their own as the price for doing so.

(2) *The Company*

The Company offers an additional alternative route: that private parties may adopt quotas in response to identifiable discrimination which may be "external" to the workplace but which nevertheless affects the composition of their workforce. (Co. Br. 46-49). The Company has focused on a consideration which was voiced by all of the sponsors in the debates over Title VII, but, we believe, has drawn the wrong conclusion. Time and again the sponsors articulated the reasons why blacks did not enjoy equal status in the workplace: in part because of employment discrimination, but also in part because of discrimination in education, in job training and so on.[11] While Congress recognized that blacks would not achieve equity in the workplace simply from an end to employment discrimination,[12] Title VII was aimed at that one cause of disadvantage. And, as § 703(j) makes plain, Congress declined to place an affirmative duty on employers and unions to address the effects on their workforces resulting from external societal discrimination. But, at the same time, as we documented in our opening brief, Con-

[10] See nn. 11 and 12, *infra*.

[11] See, e.g. 110 Cong. Rec. 6547, 6548 (Senator Humphrey); *id.* at 7204 (Senator Clark); *id.* at 7241 (Senator Case); *id.* at 6562 (Senator Kuchel).

[12] *Ibid.* See also, statements cited at Un. Br. 83-84.

gress chose *not* to *legislate a prohibition* against employers and unions taking affirmative steps to accelerate the progress of blacks to equity in the workplace.

It therefore makes no sense to conclude, as the Company does, that Congress intended to require employers and unions to *prove* by *record evidence* in each case in which a quota is challenged the discrimination (whether "internal" or "external") that in fact explains the racial imbalance in their particular workforce. Congress believed discrimination of one kind or another was the pervasive cause of such imbalances. The Congressional judgment, based in part upon that belief, was to leave the subject of affirmative action by private parties *unregulated*, not to regulate it by requiring in every case that Congress' belief be reconfirmed.[13]

CONCLUSION

As the many briefs filed in this case suggest, there are widely divergent views as to the desirability of private affirmative action, and as to its appropriate limits, if any. To date, Congress has not opted to evaluate affirmative quota selection programs and/or to draw distinctions between them.[14] Its decision in 1964 was to leave this matter where it then was: in the hands of private employers and unions. If Congress becomes dissatisfied with actions taken in the private sector, it is free at any time to legislate the necessary restrictions. Should Congress undertake to do

[13] Nor is it conceivable that Congress could have intended that an employer, a union, and the employer's employees would litigate the existence or non-existence of discrimination by parties wholly outside the lawsuit; here, e.g., the institutions in Louisiana which provided craft training prior to 1974.

[14] Whatever one's assessment of the 1964 legislative history recounted in USWA's opening brief, this much is clear: Congress did not focus upon the pros and cons of private affirmative action plans, and thus could not have reached a judgment as to their *desirability*. The lesson we have drawn from that legislative history is not that Congress *endorsed* such plans, but only that it elected not to prohibit them.

so, it will be in a position (as this Court is not) to draw prudential lines between those instances in which private quotas to end racial imbalance are desirable and those in which they should be prohibited. It is readily apparent that the many possible dividing lines which the other parties and the *amici curiae* proffer in this case between permissible and impermissible affirmative action have no root in the existing statute, and simply reflect the views of the various authors and interest groups as to what the line ought to be. But the decision whether to draw a line, and if so what line, is for Congress to make, and this Court should not usurp that function. Therefore we do not invite this Court to "legislate" a set of rules to resolve the dilemma identified in our opening brief (Un. Br. 14). We urge only that the Court recognize that "Congress' policy has not yet moved to that point" (*Labor Board* v. *Insurance Agents*, 361 U.S. 477, 500 (1960)).

The decision and judgment below should be reversed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES:

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Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) 10

Constructors Association v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978) . 8

EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, —— U.S. ——, 98 S. Ct. 3145 (1978) 8, 10

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 11

Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *petition for cert. filed* 9

Green v. County School Board, 391 U.S. 430 (1969) ..16, 17

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Hazelwood School District v. United States, 433 U.S. 299 (1977) 13
In re International Paper Co., 69 Lab. Arb. Rep. 857 (1977) 16
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 11
McDaniel v. Barresi, 402 U.S. 39 (1971) 6
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 15
Ohio Contractors Association v. Economic Development Administration, 452 F. Supp. 1013 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978) 9
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Regents of the University of California v. Bakke, —— U.S. ——, 98 S. Ct. 2733 (1978) ..... *passim*
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 6
United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) 8
United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976) 10
United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) 17
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Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977) 9

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42 U.S.C. § 2000e-2(j) (1976) 6
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CONGRESSIONAL AUTHORITIES:

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118 Cong. Rec. 7168 (1972) 7
Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 10

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OTHER AUTHORITIES:

Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 732 (1972) 10
Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e at 1232 (1976) ..... *passim*
Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214 (1977) 5

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Two years ago, the Union told the Fifth Circuit that "the facts [of this case] presented a prima facie case of pre-1974 discrimination."[1] Now it avers that no such facts existed.[2] In the court below, the Union stated that the "threshold question" in this case is "just how clear the record of prior discrimination must be in order to license the parties to take *remedial* steps."[3] Today it avers that this question "is not presented on this record."[4]

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[1] Union's Appeal Brief at 11. For the convenience of the Court, a copy of this Brief has been lodged with the Clerk.

[2] Union's Brief at 77.

[3] Union's Appeal Brief at 15 (emphasis added).

[4] Union's Brief at 78.

Only the Union can explain its startling reversal of field, and only the Union knows whether its objectives have changed along with its position. However, if this Court accepts the Union's view that "quotas can be voluntarily adopted by employers and unions but may never be required by a court as Title VII remedies," the consequences are clear. First, the Company's program would remain in force—but only for so long as it was not voluntarily changed through collective bargaining. Second, new programs would be adopted only if employers and unions voluntarily agreed to do what no court or government agency could order them to do even if they had been found to have discriminated. While it is a mistake to underestimate the role of voluntarism in eliminating discrimination, history teaches that it would be a greater mistake to believe that voluntary action can be the exclusive solution.

The Union's new argument would produce precisely the result that Respondent has consistently sought: the end of voluntary race conscious remedies. The Respondent may differ with the Union in conceding that the Company's 1974 training program would meet a "compelling goal" if it was a "remedy . . . for discrimination against identified individuals." But, like the Union, he argues—contrary to the facts—that the program did not have a remedial intent. Furthermore, the Respondent wrongly claims that the program could be remedial only if its benefits were limited to individual victims of past discrimination. Despite these differences in reasoning, acceptance of either the Respondent's or the Union's position would inevitably perpetuate the exclusion of women and minorities from a broad range of employment opportunities for years to come.

Kaiser has consistently opposed this result. It reiterates here its view that voluntary remedial race conscious action may be lawful if taken under circumstances which reasonably could be construed to require a remedy, and if the remedy itself is reasonable. In support of that position, the Company responds here to four points raised by the Respondent and the Union: First, the 1974 training program was remedial. Second, the legislative history of Title VII does not preclude race specific selection procedures instituted to achieve compliance with Title VII and Executive Order 11246. Third, the benefits of such selection procedures need not be limited to actual victims of discrimination. Fourth, affirming the judgment of the Court of Appeals would radically change Title VII and would have a severe, damaging impact on the employment opportunities of women and minorities for at least a generation.

I. THE 1974 TRAINING AGREEMENT WAS INTENDED TO REMEDY IDENTIFIED DISCRIMINATION

The Respondent and, surprisingly, the Union embrace the trial court's erroneous conclusion that there was "no evidence" Kaiser adopted the 1974 training program and its race specific selection system "with a view toward correcting the effects of prior discrimination."[5] Both the Respondent and the Union assert that the purpose of the 1974 agreement was simply to eliminate racial imbalance and respond to societal discrimination.[6]

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[5] Appendix to Petition for Certiorari ("Pet. App.") at 53a; 415 F. Supp. at 765; Respondent's Brief at 19, 54-70; Union's Brief at 10-11, 77.

[6] Respondent's Brief at 12-16; Union's Brief at 2.

Such assertions are myopic; they ignore both the facts and the state of the law at the time of the 1974 agreement.[7] Those factors make clear that in 1974 Kaiser had cause to be concerned about whether the underrepresentation of minorities and women in craft jobs at Gramercy and other plants was defensible under either Title VII or Executive Order 11246.

The Company has denied and still denies that it has violated Title VII or any other equal employment opportunity law. However, it would have been fatuous for the Company to have concluded, as Respondent does now, that evidence of its possible discrimination "does not exist." Such a conclusion would surely be suspect in the light of the Fifth Circuit's recent decision in *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), which reversed a judgment for Kaiser in a Title VII case involving another Louisiana plant of the Company—a plant also covered by the 1974 craft training agreement.

The Company and the Union explicitly recognized this state of affairs in the 1974 agreement and in the report of a Joint Committee established to implement that agreement. They stated in the agreement that "litigation is pending which may have some bearing on employment conditions for female and minority employees in the bargaining unit."[8] The agreement directed, therefore, that a Joint Committee review the representation of those groups in craft jobs and, where necessary, set appropriate goals to increase that representation. The agreement also specified that a one-to-

[7] These matters were explored in detail in Kaiser's Petition for Certiorari and in its initial Brief.

[8] Joint Appendix ("J.A.") at 135.

one selection ratio would apply until the goals are reached as long as qualified candidates were available.

The appointed Committee reviewed minority and female representation in all craft jobs at each plant. It concluded that

> notwithstanding the efforts made by the Company and the union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions.[9]

It was on this basis that the one-to-one selection ratio was made applicable to all selections for craft apprenticeship positions at all fifteen of the Company's plants covered by the 1974 agreement. This program was thus designed to meet problems of discrimination identified by federal agencies and courts and, as such, satisfies the criteria for race conscious action articulated by a majority of this Court in *Regents of the University of California* v. *Bakke*.[10]

Long before the *Bakke* decision, the Union itself recognized the possibilities of discrimination which the Company addressed in adopting the 1974 agreement.

[9] J.A. at 145.

[10] —— U.S. ——, 98 S. Ct. 2733, 2757-58 (1978) (opinion of Mr. Justice Powell), 2775 n.17, 2781 (opinion of Mr. Justice Brennan). Indeed, the 1:1 apprentice ratio incorporated in the 1974 training agreement reflects not only the provisions of the Steel Industry Consent Decree but also the prior decree of Judge Pointer in United States v. U.S. Steel, 371 F. Supp. 1045 (N.D. Ala. 1973), which led to that decree. Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214, 220-21 (1977).

In its Brief to the Fifth Circuit, the Union argued that "the parties negotiated their agreement against a factual background which, at least arguably, contained elements which courts would find discriminatory ...."[11] The Union is, of course, free to change its position. But it cannot change the facts or obscure the clearly remedial character of the 1974 agreement.

II. VOLUNTARY REMEDIAL RACE CONSCIOUS SELECTIONS ARE NOT FORECLOSED BY THE LEGISLATIVE HISTORY OF TITLE VII

Kaiser fully agrees with Respondent and the Union that the failure to adopt quotas to eliminate racial imbalance does not constitute a violation of Title VII. However, it rejects the Union's conclusion, based on some congressional statements construing § 703(j), that race conscious remedies are unavailable under § 706(g).[12]

Subsection 706(g) gives courts a broad mandate to order "appropriate" affirmative action or "other equitable relief" to remedy discrimination.[13] The Union seizes upon the last sentence of the subsection as a limitation on this remedial authority. That sentence states that

> [n]o order of the court shall require ... the hiring ... of an individual ... if such individual ... was refused employment ... for any reason other than discrimination on account of race, color, religion, sex or national origin ....

The sentence the Union cites was not intended to prohibit courts from ordering quota remedies. As finally amended[14] and adopted, the provision was explained by House Judiciary Committee Chairman Emanuel Celler as follows:

> The purpose of the amendment is to specify cause. Here [*sic*] the court, for example, cannot find any violation of the Act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin. That is the purpose of this amendment.[15]

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[11] Union's Appeal Brief at 14-15. Respondent noted that the Union had made similar arguments in its post-trial brief in the district court. Respondent's Brief at 19 n.97.

[12] 42 U.S.C. § 2000e-2(j) and 42 U.S.C. § 2000e-5(g); Union's Brief at 70-71. As the Government noted in its Brief at 31 n.15, the language of § 703(j) corresponds to a provision of Title IV. 42 U.S.C. § 2000c(b), c-6 (1976). The Court has not permitted this provision to preclude the assignment of students by race where necessary to eliminate imbalances caused by discrimination. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971); McDaniel v. Barresi, 402 U.S. 39, 41-42 (1971). As the Union has observed, the 1964 legislative history reveals an intent that Title IV and Title VII be construed and implemented consistently. Union's Brief at 66-70.

[13] The phrase "any other equitable relief as the court deems appropriate" was added when the Act was amended in 1972. It clarifies congressional intent that relief for discriminatees be as broad as possible. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975), *quoting* 118 Cong. Rec. 7168 (1972) (statement of Senator Williams).

[14] Originally, the sentence stated more simply that an employer could not be required to hire an individual who was rejected "for cause." 110 Cong. Rec. 2567 (1964).

[15] *Id.*

The Union's argument was explicitly rejected when raised by the union intervenors in *EEOC* v. *AT&T*, 556 F.2d 167, 175-76 (3d Cir. 1977), *cert. denied*, —— U.S. ——, 98 S. Ct. 3145 (1978). There the Court of Appeals concluded that the sentence at issue "merely preserves the employer's defense that the non-hire, discharge, or non-promotion was for a cause other than discrimination." Since this sentence cannot, therefore, be read as a limitation upon a court's remedial authority under § 706(g), the Union's legislative history argument ultimately comes to nought.[16]

Other developments since 1964 confirm this view of the statute. First, as the majority of this Court in *Bakke* made clear, the Court has not forbidden preferential relief under Title VII.[17] To the contrary, Mr.

[16] Apart from its analysis of § 706(g), the Union's and Respondent's argument is padded with statements of congressional leaders who sought to assuage the fears of their critics that a failure to adopt quotas would constitute a violation of the Act. *Id.* at 33-34, 49, 56, 59-65. The few statements that may lend comfort to the Union, taken in the context of the thousands of pages of legislative history, including contrary indications, are not reliable indicia of congressional purpose with regard to § 706(g).

[17] Respondent acknowledges that this case does not raise a question of the constitutional permissibility of the race conscious remedial preferences voluntarily adopted by Kaiser. Respondent's Brief at 46. If such an issue were to arise, however, it would be akin to those involving "voting rights" or "minority set-asides" in which the legislature or an administrator has made a finding of a constitutional or statutory violation, and has provided for a race conscious remedy. In such situations, the courts consistently have upheld race conscious classifications. *See Bakke*, 98 S. Ct. at 2758 (opinion of Mr. Justice Powell). United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) (race conscious redistricting without proof of past unconstitutional apportionments held constitutional); Constructors Ass'n v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978) (constitutionality of small business minority set-asides upheld); *accord*,

Justice Powell there noted his approval of racial preferences to remedy "identified discrimination," *id.* at 2754, 2758 n.44; and Mr. Justice Brennan observed that "judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action," *id.* at 2775 n.17.

Second, federal courts of appeals have construed Title VII to permit race conscious remedial preferences.[18] Even the Fifth Circuit majority below did not go so far as the Union does now in claiming that a court may not order remedial preferences under Title VII.[19]

Third, contrary to the contentions of the Respondent and the Union,[20] it is a fact that both Houses of Congress [21] specifically approved of race conscious reme-

Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *petition for cert. filed*; Ohio Contractors Ass'n v. Economic Dev. Administration, 452 F. Supp. 1013 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978). In this case, Title VII should not be construed to disable courts from ordering the kind of relief that Congress has ordered and that this Court has upheld as constitutional where the Congress has made its own findings of discrimination.

[18] *See* cases cited, Kaiser's Brief at 39 n.106, 44 n.115; Government's Brief at 26-27, 33.

[19] "Prior to the 1972 amendments to Title VII, our circuit approved . . . the use of a quota remedy to overcome employment discrimination. . . ." Pet. App. at 7a; Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 220 (5th Cir. 1977).

[20] Respondent's Brief at 41-45; Union's Brief at 74-76.

[21] The Union's statement in its Brief at 75 that "there were no votes at all in the House on any proposed amendments dealing with quotas" during discussion of the EEO Act of 1972, although

dial preferences in 1972 by rejecting proposed amendments to the Equal Employment Opportunity Act designed to change the implementation of Executive Order 11246 and reverse the prevailing judicial interpretations of Title VII.[22] The courts have found this failure of Congress to adopt the proposed anti-quota amendments to be "unusually clear evidence"[23] of congressional approval of race conscious preferences.[24]

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technically correct, ignores the real meaning of the House's action. The "Dent [anti-quota] Amendment," although never brought to a vote, was generally understood by the members of the House as being an amendment which would pass if the "Erlenborn substitute amendment" were rejected. Congressman Dent himself articulated the meaning of the vote on the Erlenborn amendment:

> We will let the Erlenborn amendment come to a vote of the House without offering any amendments whatsoever to it . . . . We say in my amendments that it was the intent of Congress that there should be no quotas . . . . *You know what you are doing. If you vote for the Erlenborn substitute amendment you vote for quotas* . . . [emphasis added].

Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 254-56. In the face of this clear admonition by the leader of the anti-quota forces, the House proceeded to enact the Erlenborn amendment. *Id.* at 312-17.

[22] Kaiser's Brief at 34-35 & n.97; Government's Brief at 31-35.

[23] United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1019-20 (3d Cir. 1976).

[24] *Id.*; Regents of the Univ. of Cal. v. Bakke, —— U.S. ——, 98 S. Ct. 2733, 2781 n.28 (1978) (opinion of Mr. Justice Brennan); EEOC v. AT&T, 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied*, —— U.S. ——, 98 S. Ct. 3145 (1978); Boston Chapter NAACP v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Comment, ***The Philadelphia Plan: A Study in the Dynamics of Executive Power***, 39 U. Chi. L. Rev. 732, 747-60 (1972).

III. IDENTIFICATION OF VICTIMS OF PAST DISCRIMINATION IS NEITHER NECESSARY NOR POSSIBLE FOR VOLUNTARY REMEDIAL ACTION

Respondent erroneously contends that voluntary race conscious remedial action is legal only if it is strictly limited to individual victims of past discrimination.[25] Further, the Union asserts that court-ordered remedies for such victims must be limited to putting such victims in their rightful place.[26] These contentions reflect an unduly narrow view of the aims of Title VII and the reality of voluntary compliance.

Both of the Title VII cases which Respondent cites for the proposition that only identifiable victims may benefit from voluntary remedial action deal with the "make whole" purpose of Title VII and the "rightful place" remedial theory which underlies it.[27] Title VII, however, has an additional "prophylactic" pur-

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The Respondent has further misconstrued the meaning of congressional action on a proposed anti-quota amendment to the Departments of Labor and Health, Education and Welfare appropriation bill for 1978. Respondent's Brief at 45 n.184. This amendment was rejected by the Conference Committee. "The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered . . . ." *Bakke*, 98 S. Ct. at 2777 (opinion of Mr. Justice Brennan).

[25] Respondent's Brief at 70-75.

[26] Union's Brief at 19-20, 70-71, 78-82.

[27] *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

pose [28] which this Court has explicitly endorsed, but which Respondent and the Union reject.[29] The prophylactic aim of Title VII is

> to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees.[30]

This Court has never considered the scope of action which may be justified or required by Title VII's prophylactic aim. Decisions on "rightful place" relief to individuals do not decide the issue here [31] since, by its very nature, the prophylactic purpose of Title VII concerns groups and not individuals. However, in considering another broad aim—educational diversity—Mr. Justice Powell concluded in *Bakke* [32] that race might be considered in school admissions without suggesting that the benefits of that consideration should be limited to applicants who were previously rejected. A similar result is appropriate under Title VII. While the scope of voluntary race conscious remedial action must be reasonable under the circumstances,[33] it should not be limited by a "make whole" theory because Title VII's prophylactic objective is broader than that.[34]

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[28] Indeed, this Court has called it Title VII's "primary objective." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[29] *See* Respondent's Brief at 72-75; Union's Brief at 78-82.

[30] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[31] *See* Kaiser's Brief at 41 n.107.

[32] 98 S. Ct. at 2760-63.

[33] *See* Kaiser's Brief at 44-60.

[34] On this basis, among others, many courts have concluded that relief extending beyond individual victims is proper under Title VII. *See* Kaiser's Brief at 39 n.106. Respondent does not deal with any of these decisions, some of which are cited with approval in Mr. Justice Powell's opinion in *Bakke*. *Id.* at 41.

Respondent also overlooks the fact that employers and unions can be found to have violated Title VII on the basis of unrebutted class-wide statistics.[35] If liability may be imposed on a class-wide basis, compliance efforts like the 1974 training program should be evaluated on that same basis.[36]

Respondent denigrates voluntary compliance—the "preferred means" of achieving Title VII's aims [37]—by minimizing the "administrative inconvenience" [38] of identifying individual victims of discrimination. The practical considerations involved in voluntary compliance cannot be dismissed so cavalierly. "Identification" of victims of discrimination is generally impossible in a voluntary setting. Although courts and government agencies can attempt such identification within the limits of their resources,[39] their remedies are obviously not voluntary. If, however, employers' unions must themselves "identify" victims of discrimination, in the process they must admit they have discriminated

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[35] Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). *See* Kaiser's Brief at 15-16.

[36] If voluntary compliance is limited to remedies for identifiable victims, many employers could find it impossible to reduce significantly the risks posed by a potential prima facie statistical case. Past "victims" are not always "identifiable." Those who might be identifiable cannot always be found. Rejected applicants go elsewhere, as do former employees. If benefits can be voluntarily provided only to such persons, concerns over statistical underrepresentation may be ineradicable.

[37] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

[38] Respondent's Brief at 74-75.

[39] Kaiser's Brief at 23-27.

in the past. As discussed in Kaiser's main brief,[40] this requirement would leave employers and unions teetering on the "high tightrope without a net beneath them."

By relying only on cases concerning post-litigation remedies to individuals, Respondent has gone astray. His narrow focus ignores Title VII's primary prophylactic objective and would require employers either to go to court or to act like courts. Voluntary remedial action would not be feasible under such circumstances.

The Union's position would generally produce the same result. Under its view, companies and unions could voluntarily agree to take race conscious action which courts could not impose even where discrimination had been found. "Highly motivated" and "creative"[41] as the Steelworkers have been on equal employment opportunity matters, it is doubtful that even they will be able to continue programs which may be regarded as disadvantageous to white male members and which are not arguably required for compliance with federal law.

IV. THE RESULT REACHED BY THE COURT OF APPEALS AND ENDORSED BY RESPONDENT WILL RADICALLY ALTER THE NATURE OF TITLE VII AND DELAY ALMOST INDEFINITELY THE ACHIEVEMENT OF EQUAL EMPLOYMENT OPPORTUNITY FOR MINORITY AND FEMALE WORKERS

Respondent's Brief ends in a flurry of bleak, but unsupported, speculations about the consequences of permitting actions like the 1974 training program. In contrast to such speculations, there are two consequences of accepting Respondent's arguments and affirming the

[40] *Id.* at 30-43.

[41] Union's Brief at 9, *citing* testimony of Thomas Bowdle.

Court of Appeals' judgment which are as sure as anything can be.

First, affirmance will radically alter the nature of Title VII. This statute embodies a national policy of "the highest priority."[42] It was not, and has never been construed to be, a law which merely provides a remedy for individual injuries and goes no further. Instead, Title VII and its potential remedies are meant to "provide the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices"[43] and to encourage voluntary compliance."[44]

If the judgment of the Court of Appeals is affirmed, self-examination and affirmative action will largely end. Such action is, almost by definition, race conscious. Under Respondent's arguments and the Fifth Circuit's holding, the perils of race conscious programs will be prohibitive. Employers will be barred from taking such action unless they are prepared to admit to past discrimination and identify their victims. Title VII will become a law which discourages what was intended to be the "preferred means"[45] of achieving its larger purposes.

The second certain result of affirming the judgment below is that full participation of women and minorities in the workforce will be further delayed. This fact must be squarely faced: the progress of minority group

[42] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), *quoting* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968).

[43] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[44] Alexander v. Gardner-Denver Co., *supra*, 415 U.S. at 44.

[45] *Id.*

members and women—which is temperate even with steps like the 1974 training program[46]—will become glacial. The pace of change will be imperceptible. This will be true not only at Gramercy but in many other industrial apprentice programs.[47]

Mr. Justice Blackmun recognized this fact in his opinion in *Bakke* when he stated:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.[48]

CONCLUSION

The judiciary's long and often frustrating experience in trying to achieve school desegregation is instructive in this case. Mr. Justice Brennan noted in *Green* v. *County School Board,* 391 U.S. 430, 439 (1969), that

> [t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.

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[46] *See* Kaiser's Brief at 52 n.135. (This footnote in Kaiser's initial brief contains the following phrase which should be omitted: "that Kaiser added an average of seven black trainees per year;".)

[47] Evidence in a similar situation involving a paper company established that 96% of the minorities admitted to an apprenticeship program in four years under a 1:1 affirmative action selection ratio would not have been admitted under straight seniority and that it would be at least 10 more years before blacks would have enough seniority to compete proportionately with whites for apprenticeship opportunities. *In re* International Paper Co., 69 Lab. Arb. Rep. 857 (1977).

[48] 98 S. Ct. at 2808.

The Court also stated in the *Green* case that a remedial plan should be judged in terms of whether it "promises realistically to work, and promises realistically to work, *now.*" *Id.* (emphasis in original).

Under that standard, the Supreme Court subsequently reversed a court of appeals' modification of a lower court order setting specific ratios for assignment of black and white teachers in various schools for the coming year. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The Court viewed the modification as taking "from the order some of its capacity to expedite, by means of specific commands, the day when . . . [nondiscrimination] becomes a reality instead of a hope." *Id.* at 235.

The program challenged in this case has already proved its capacity to work. There is no other way to utilize the parties' established seniority system and provide meaningful opportunities in craft jobs to minorities and women for years to come. Kaiser respectfully asks the Court not to condemn this means of promoting a more fully integrated work force.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 22 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435 and 78-436

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, ET AL.

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

BRIAN F. WEBER, ET AL.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The central question in this case is whether Kaiser could lawfully take reasonable race-conscious steps to

remedy the effects of apparent Title VII violations without admitting and proving that it had in fact been guilty of past discrimination.

Respondent does not address this question directly. Instead, he argues (Br. 13-16, 54-58) that this issue is not before the Court because Kaiser's reasons for instituting the affirmative action training programs had nothing to do with remedying arguable past discrimination by the company. Respondent also asserts (Br. 57-58) that Kaiser never analyzed minority employment conditions at the 15 plants included in the programs to determine whether remedial action was necessary.

As he concedes in passing (Br. 13 n.60), respondent's theory of Kaiser's motivations for establishing the affirmative action programs are contrary to the district court's findings. The district court found that Kaiser's "prime motivations" were to avoid litigation by minority employees and to comply with OFCC requirements implementing Executive Order 11246 (Pet. App. 65a). The district court did not dispute that Kaiser had reason to believe that it would be vulnerable to successful Title VII actions or to coercive sanctions under the Executive Order. Even on the sketchy record in this case, the district court concluded that the extreme under representation of blacks in the craft positions at Gramercy "might suggest that Kaiser had discriminated against blacks when filling craft positions" (*ibid.*). But, because Kaiser did not admit and prove its past discrimination, the court held the company's affirmative action measure unlawful (*id.* at 64a-65a, 77a). The court of appeals agreed (*id.* at 17a-23a). Our submission is that these courts applied an erroneous legal standard in holding these programs unlawful.

Respondent contends that the record reflects that Kaiser was totally unconcerned about its vulnerability to coercive Title VII relief and instituted the new training

programs solely to rectify the effects of "societal discrimination." The record, however, shows without ambiguity that Kaiser implemented these programs because, following an analysis of employment conditions at the 15 selected plants, it determined that such remedial measures were required by law.

The 1974 Labor Agreement between Kaiser and the Steelworkers states with clarity the parties' reasons for engaging in affirmative action (A. 135-136):

> As an integral part of 1974 Negotiations, the parties have noted that litigation is pending which may have some bearing on employment conditions for female and minority employees in the bargaining unit. Finally, the parties have considered the impact on seniority systems and job security that technological developments, environmental and economic controls, and widely fluctuating business conditions have had and may continue to have on each employee in the bargaining unit.
>
> By reason of these considerations, the parties have agreed to incorporate into the 1974 settlement this supplemental agreement which will enable the parties quickly and effectively to make adjustments or revisions in their seniority and selection practices when judicial decisions dictate such action is necessary. This supplemental agreement will make it possible for the parties to relate such adjustments or revisions to the circumstances prevailing at the time such action is taken and to the conditions then existing at each location.
>
> A variety of remedial measures may be required by these federal court decisions. In order that both members of the bargaining unit and local management may be made aware of what the courts have required, we cite below some remedial measures

> which may be implemented through mutual agreement if necessary to assure continued compliance with the Acts.

The Labor Agreement then states (A. 137) that a joint company-union committee "will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the [15] plants set forth below [including Gramercy], and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio."

Kaiser and the Steelworkers next issued a joint "memorandum of understanding" which established the affirmative action training programs (A. 139-155). The memorandum states that, in compliance with the Labor Agreement, "the Joint Implementation Committee has met to resolve possible inconsistencies with Government and judicial decisions" (A. 139). While not admitting to any past violations of Title VII or Executive Order 11246, the parties stated that affirmative action was necessary "to fully comply with both the letter and the spirit of Title VII of the Civil Rights Act and Executive Order 11246" (*ibid.*). The joint committee "reviewed and/or visited all of the plant sites" covered by the Labor Agreement to determine "the impact, if any, that past or present job placement and/or seniority practices might have on the minority and female employees in the respective bargaining units" (*ibid.*). With respect to craft positions, the memorandum states (A. 144-145):

> As agreed to in the 1974 Master Aluminum and Can and Container Labor Agreements negotiations, the Joint Company-Union Implementation Committee has reviewed all of the existing Trade, Craft, and Assigned Maintenance classifications with respect to their representation of minority and female employees. Said review has determined that, notwithstanding the efforts made by the Company and the Union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions. Consequently, based upon the aforementioned conclusion the parties have agreed to the implementation of the following steps to achieve their desired objective.

The memorandum then sets forth the details of the affirmative action training programs (A. 145-146) and concludes that these programs "should insure the continued compliance by the Company and the Union with the ever-changing status of the law in this area" (A. 146).

Thus, the record is clear that Kaiser and the Steelworkers conducted a self-analysis of minority employment in skilled craft positions at 15 of the company's plants and determined that race-conscious affirmative action was necessary to ensure compliance with the law. The selective references to the trial testimony in respondent's brief (at 56-57) are not to the contrary.[1]

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[1] Respondent quotes statements from the two Kaiser officials who testified that they did not believe that there had been past discrimination at the Gramercy plant. They also stated, however, that Kaiser was aware that a court might not agree and therefore instituted the programs. See our main brief at 10-12. When asked whether the affirmative action programs were prompted by "the experience that the parties to the contracts had had and were having in the field of equal employment opportunity," Kaiser's national director for equal employment opportunity matters responded (A. 97):

> Certainly, it had impact on it. The litigation that the various companies have been involved in, the historical relationships with the Federal agencies that we are all concerned with, certainly, the steel agreement, I think it was our position that we should * * * do those things that are necessary, without having to have it forced down our throat or require us to go into court to comply with the laws of the land.

We recognize that respondent's views as to Kaiser's and the Steelworkers' motivations are now shared by the union (see USWA Br. 77). But the union did not call any witnesses at trial; its present position is not supported by the record; and in the lower courts it argued that the reasons for the affirmative action programs were those we urge now.[2] We think that the question presented in this case was phrased correctly by the Steelworkers in the court of appeals:

> May an employer and union, in collective bargaining, install remedies for *arguable* Title VII violations comparable to those which a court would install if it adjudicated and determined that there *were indeed* such Title VII violations?

Brief for Defendant-Appellant United Steelworkers of America, AFL-CIO, at 2 (emphasis in original). And, for the reasons elaborated fully in our principal brief, we submit that the Steelworkers correctly answered this question below:

> The solution * * * must lie in allowing employers and unions to confer remedial priorities when there is before them substantial evidence indicating a reasonable possibility that their practices will be found unlawful, and that a court would require priority access for "affected class" members as a remedy. Puting it another way, if the evidence suggests that a plaintiff could establish a *prima facie* case and that the defendants do not have an obviously convincing rebuttal, then they should be

[2]In its brief in the court of appeals, the Steelworkers Union stated that the affirmative action programs "were prompted, at least in part, by the parties' perceptions of Title VII requirements as enunciated by the courts and emphasized by the EEOC and OFCC. As one Company witness testified, 'we realized that if we did not do something on our own, then the Government was going to do it for us.' " Brief for Defendant-Appellant United Steelworkers of America, AFL-CIO at 8 (record citations omitted).

> permitted to confer remedial priorities as a court would were it to adjudicate the case and find unlawful behavior
>
> * * * [T]he employer and union in the instant case had before them such evidence, and thus were entitled to act as they did.

Id. at 19-20 (emphasis in original).

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

Supreme Court, U. S.
FILED
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BRIAN F. WEBER, ET AL.,
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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties,[1] respectfully submits this brief *amicus curiae* in support of the petitions for a writ of certiorari in this case.

INTEREST OF THE *AMICUS CURIAE*

This case presents questions of great importance to employers throughout the United States, including EEAC's members, who are subject to the provisions of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e, *et seq.*) (Title VII) and Presidential Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978).) (E.O. 11246).[2] At issue is whether these regulatory schemes permit an employer and union to enter into a racially-based affirmative action program designed to remedy proportionate underrepresentation of minority employees in certain segments of the employer's workforce when there has been no judicial determination of past employment discrimination by the particular employer.

Most of EEAC's member representatives are charged with corporate responsibility for voluntary compliance with the federal civil rights laws.[3] As

[1] Their consents have been filed with the Clerk of the Court.

[2] There are approximately 325,000 employer contractors subject to the requirements of E.O. 11246. They employ about 30 million persons. *See Major Federal Equal Employment Opportunity Programs for the Private Sector Should be Consolidated,* A Report by the Comptroller General of the United States (HRD-78-72), June 9, 1978, p. 3.

[3] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, e.g., *The Regents of the University of California* v. *Allan Bakke,* 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters,* 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977); and *Gardner* v. *Westinghouse Broadcasting Company,* —— U.S. ——, 46 U.S. L.W. 4761 (1978).

equal employment officers of employers which, for the most part, are federal contractors, they must attempt to determine not only their federal nondiscrimination and affirmative action obligations, but also the potential liability which those requirements might create to nonminority employees and applicants who may assert that these affirmative action efforts are unfair and discriminatory.

The decision of the Fifth Circuit majority below, holding that the program adopted by Kaiser and the Steelworkers violated Title VII, illustrates and intensifies the dilemma created by these competing interests. It places employers in the ironic and unfair position of facing liability to nonminority or

male employees because of good faith attempts to comply with the requirements found in statutes, executive orders and other government directives intended to prevent discrimination against minorities and women. Acceptance of this case for review would enable this Court to provide urgently needed guidance with respect to the permissible limits of affirmative action.

STATEMENT OF THE CASE

In 1974, Kaiser and the United Steelworkers of America ("Steelworkers") attempted to cure a severe deficiency of minorities in Kaiser's craft workforce by entering into an agreement establishing a new craft training program at each of 15 plants.[4] Kaiser was under substantial pressure from its federal contract compliance agency to rectify this imbalance and to increase its utilization of minorities in craft positions in order to comply with E.O. 11246 (Pet. App. 2a-3a; Kaiser Cert. Pet. at 3).[5] The program was adopted at least in part out of concern for possible enforcement proceedings by the Office of Federal Contract Compliance (OFCC).

Under the program adopted, eligible employees were divided into minority and nonminority groups. Openings were to be filled on a one-to-one basis in order of seniority from within each group. If selection for these openings had been based solely on seniority, and if race had not been taken into account, no minority employees would have been eligible to be admitted. Brian Weber—a white employee who had more seniority than some blacks selected—filed a Title VII suit alleging that he had been discriminated against on the basis of his race because he had not been selected for the program.

The Fifth Circuit majority found the craft admission program violated Title VII, and ruled that "[t]here can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the [particular employer's] employment scheme." (Pet. App. 9a). The majority opinion also rejected assertions that the training program was permissible on the basis that it was designed to correct past "societal" discrimination. (Pet. App. 16a). It reasoned that in the absence of prior discrimination by the particular employer, a racial quota loses its character as an equitable remedy and "must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)." (Pet. App. 15a).

The majority opinion also rejected assertions that the implementing ratio contained in the craft program could be supported independently by reliance upon E.O. 11246. It concluded, broadly, that attempts of the OFCC to distinguish a numerical goal from a quota have "proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas." (Pet. App. 10a). The majority then held that "[i]f E.O. 11246 mandates the training program at issue here, *in the absence of any prior hiring or promotion discrimination*, the executive order must

[4] The same provision is contained in Steelworkers' agreements with other aluminum companies and also in the steel industry consent decree. See *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

[5] "Pet. App." references are to the appendix to Kaiser's petition.

fall before this direct congressional prohibition [in Title VII]." (Pet. App. 21a, emphasis in original).

In dissent, Judge Wisdom stated that the standard established by the majority was too strict. He would have ruled that:

> If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from liability would encourage private settlements. (Pet. App. 28a-29a).

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE RECURRING DILEMMA POSED BY CONFLICTING INTERPRETATIONS OF THE PERMISSIBLE EXTENT OF EMPLOYER AFFIRMATIVE ACTION.

A. The Impact on Voluntary Compliance with Title VII

The majority and dissenting opinions of the court below have had an impact far beyond the particular parties to this lawsuit. The opinions have increased the uncertainty over whether affirmative action programs adopted to remedy underutilization of minorities in an employer's workforce are permissible under Title VII and E.O. 11246 in the absence of findings that an employer has engaged in acts of past discrimination against the specific identified individuals who are beneficiaries of the program. Until the questions raised by the opinions of the Fifth Circuit are addressed by this Court, the enforcement of both Title VII and the Order may be substantially disrupted.

Thus, aside from any conclusion as to the soundness of either the majority or dissenting opinions below, there can be little disagreement with dissenting Judge Wisdom's statement that (Pet. App. 26a-27a):

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L. Ed. 2d 280.[6]

Judge Wisdom also correctly noted that "[d]ifferent courts may apply the law in arguably proper distinct ways," and that determining the result a court would reach in any Title VII litigation is "no small prob-

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[6] Without disagreeing with Judge Wisdom that the majority decision exposes the employer and union to possible back pay liability, we submit that his reading of the *Albemarle Paper* decision may be too literal in view of this Court's later decision in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347 (1978). There, retroactive relief was denied to known discriminatees in part because the respondent employer was confronted with a "dilemma" created by an unsettled state of the law. See *Id.* 46 U.S.L.W. at 4351-4353 and n. 38. Nevertheless, unless and until similar issues raised in the affirmative action context are resolved by this Court, back pay liability to "reverse discriminatees" will remain a possibility which responsible corporate EEO officials cannot lightly disregard.

lem" (Pet. App. 26a). Because of the potential for varying circuit court interpretations of the validity of affirmative action programs, voluntary compliance with Title VII, especially by way of nationwide collective bargaining, is rendered particularly difficult. (Pet. App. 26a).[7]

For example, employers attempting to "self-examine and to self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges of their discriminatory practices"[8] find it impossible, under present law, to determine the affirmative steps they may legally undertake to remedy imbalances which may exist between the number of minorities in their workforce and the surrounding relevant labor market area. The decision below requires them to establish findings that they have engaged in discriminatory practices and then limit preferential treatment to identifiable victims of their discrimination. In other contexts, however, other courts of appeals have suggested that preferential affirmative class relief is not necessarily limited to identifiable victims. See e.g., *Carter* v. *Gallagher*, 452 F.2d 315, 328-330 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 175-176 (3d Cir. 1977), *cert. denied*, 46 U.S. L.W. 3803 (1978); and *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted*, No. 77-1553, 46 U.S.L.W. 3780 (1978).[9]

[7] For a more complete treatment of the dilemma facing employers, see McGuiness, *Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination*, Equal Employment Advisory Council, 1977, pp. 1-9, 107-131.

[8] See *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364, 14 FEP Cases 1531 (1977).

Additionally, voluntary compliance with Title VII must be evaluated in light of the Fifth Circuit's holding that the underutilization of minorities in craft positions was not a legally sufficient reason to permit the racial preference. (Pet. App. 16a-17a). Kaiser argues that its craft admission plan was justified by the disproportionately small share of its workforce held by minorities and its knowledge that its requirement for prior experience for craft applicants had a "disparate impact" on blacks because of their former exclusion from craft unions. (Kaiser Cert. Pet. at 4-5). The Fifth Circuit, however, found that under the circumstances of this case, the remedial plan "could not be approved even if it had been judicially imposed." (Pet. App. 14a).[10]

This approach conflicts with that recently taken by the Second Circuit in *Prate* v. *Freedman*, 17 FEP Cases 1572, 1575-76, 17 EPD ¶ 8535 (2nd Cir. 1978). There the court approved a consent judgment establishing a plan for preferential hiring of minority

[9] The *Davis* case does not raise issues concerning voluntarily adopted affirmative action programs. Although it is unlikely that the issues posed in the instant case will be resolved in the Court's disposition of *Davis*, the Ninth Circuit's majority opinion appears to apply an interpretation of Title VII's remedial scope which contrasts with the opinion of the Fifth Circuit majority below.

[10] See also *Lewis* v. *Tobacco Workers*, —— F.2d ——, 17 FEP Cases 622, 627 (4th Cir. 1978) (". . . § 703(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance.")

groups. Although there were no findings or admissions of past employer discrimination, the court stated that a decree "designed to remedy the disproportionate impact of prior employment practices amounted to an admission of unlawful discrimination." 17 FEP Cases at 1575-76. Indeed, in rejecting challenges to the decree by white police applicants, the court awarded attorneys fees to the party defending the hiring preference, and characterized the plaintiffs' suit as "unreasonable and vexatious."

Given these conflicting judicial interpretations of Title VII, Judge Wisdom may well be correct in concluding that employers and unions attempting to comply voluntarily with Title VII take the chance of being liable "unless they instituted exactly what a reviewing court felt should have been instituted." (Pet. App. 27a). Their alternatives, therefore, would be to "either bring declaratory judgment actions, or wait to be sued." (*Ibid*). Without guidance from this Court, however, such additional litigation not only would be burdensome, but unlikely to provide sufficient clarification for employers whose operations are not located solely within one judicial circuit.

B. The Impact on Enforcement of E.O. 11246

The Fifth Circuit majority opinion also raises questions which may influence greatly the enforcement of E.O. 11246. That Order and supporting OFCCP affirmative action regulations require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[11] If a con-

[11] Revised Order No. 4, 41 C.F.R. Part 60-2.

tractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. 41 C.F.R. §§ 60-2.10, 60-2.12. Government officials have stated repeatedly that the statistical imbalances that trigger these affirmative action requirements *need not be connected to any showing of past or present discrimination.*[12] Failure to comply with these regulations would subject the contractor to severe sanctions, such as cancellation or termination of all federal contracts (or any part thereof); withholding progress payments on a contract; or, debarment from future contracts. See 41 C.F.R. 60-1.26; 41 C.F.R. 60-2.2(b); and 41 C.F.R. 60-30.

Because these sanctions for non-compliance are so severe and the opportunities to challenge OFCCP and compliance agency policies so restricted, compliance with the agency's affirmative action requirements is generally the only practical course available to employers whose business is directly or indirectly dependent to any substantial degree on government contracts.

As noted previously, the majority opinion below concluded in broad fashion that the attempts of the OFCCP to distinguish between various types of numerical preferential hiring programs have "proved illusory." (Pet. App. 10a). As Kaiser's petition

[12] See *Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. 77*, 88 (1971); and Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971).

aptly points out, the treatment of the requirements of E.O. 11246 by the Fifth Circuit raises concerns that "any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII unless the employer or others are prepared to establish that the employer engaged in past discriminatory acts." (Kaiser Cert. Pet. at 6). The potential effect on the Executive Order program resulting from the majority decision below should be addressed and clarified by the Court at this time.

C. The Need For Clarification of Federal Policy

Responses to the decision below by the government agencies chiefly responsible for enforcing federal equal employment requirements reveal a compelling need for a consistent definition of federal policy on voluntary affirmative action.

Shortly after the Fifth Circuit's decision was issued, EEOC published for comment its Proposed Guidelines on Affirmative and/or Remedial Action ("Guidelines").[13] The preamble to the Guidelines indicates the Commission's awareness of the employer's dilemma and acknowledges the need to clarify the law governing voluntary affirmative action. Thus, the preamble states (42 Fed. Reg. at 64826):

> There is a need for the Commission to interpret the statute to apprise employers and other persons to take such remedial and/or affirmative action of the circumstances in which they may take such action and the parameters of the action they may take without subjecting themselves to liability based upon a claim that such remedial and/or affirmative action itself discriminated against an individual or group.

[13] 42 Fed. Reg. 68426, December 28, 1977.

In responding to this need, however, the guidelines purport to establish a legal standard which mirrors the dissent of Judge Wisdom in the instant case—a fact which, in itself raises an evident conflict with the prevailing position of the Fifth Circuit. In contrast to the finding of the majority below that preferential treatment must be premised upon a finding of discrimination by the particular employer, the Guidelines merely would require that:

> An Employer or other person subject to Title VII who has a *reasonable basis* for concluding that it might be held in violation of Title VII and who takes remedial and/or affirmative action reasonably calculated to avoid that result on the basis of such self-analysis does not thereby violate Title VII with respect to any employee or applicant for employment who is denied an employment opportunity as a result of such action. *The lawfulness of such remedial and/or affirmative action program is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to Title VII taking such action has violated Title VII.* (Emphasis added). [42 F.R. at 64826].[14]

[14] Under the Guidelines, the self-analysis required to determine whether there was a reasonable basis to conclude Title VII has been violated would not need to await related findings "by judicial, legislative, or administrative bodies with competence to act in this area." See *The Regents of the University of California* v. *Allan Bakke*, 98 S. Ct. 2733, 2757-2758, 2766 (1978) (Opinions of Justices Powell, and Brennan, *et al*).

It has been reported that the proposed Guidelines are being reevaluated by EEOC in light of the public comments which raised questions about the relevance of court decisions such as *Bakke* and the decision below. See Daily Labor Report No. 182, September 19, 1978, pp. A-7 to A-9, and E-1 to E-7. A draft of the revised guidelines, which reportedly has been circulated among federal government civil rights agencies, leaves the initially published Guidelines basically unchanged. The "Supplementary Information" accompanying the reported revised draft states that "[T]he Commission does not believe that where a person's affirmative and/or remedial action is challenged, that person must produce evidence sufficient to prove it has in fact discriminated. If it has proceeded pursuant to and in conformance with Executive Order 11246, evidence of its past discrimination may be irrelevant." (*Id.* at E-3). The revised draft also states that "in the Commission's view, the majority's holding [in *Weber* v. *Kaiser*] with respect to the relationship between Title VII and the Executive Order is clearly wrong." (*Id.* at E-4).

Because there is an evident conflict between the decision below and the Commission's proposed Guidelines on voluntary affirmative action, it would be highly desirable for all concerned to have the issue resolved by this Court to eliminate the dichotomy which may result from conflicting interpretations by the judiciary and the agency principally responsible for enforcement of Title VII.

Moreover, there is also an apparent discrepancy between EEOC's proposed Guidelines and the government's petition for certiorari in this case. As noted,

the Guidelines, as proposed, state that the lawfulness of an affirmative action plan is "not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer . . . has violated Title VII." (42 Fed. Reg. at 64826). The government's petition, however, asks this Court to remand the case to the district court for another hearing to determine whether there is any evidence, not now in the record, of discrimination by either of the party defendants (U.S. Cert. Pet. at 11, 15-17, 19-20). By clear implication, the government's request means that evidence beyond underutilization of minorities may be necessary to support a voluntary affirmative action program. And although the government's petition states that discrimination need not always be established in court to support voluntary affirmative action (Cert. Pet. at 11), the evidence it asserts would be required on remand (Cert. Pet. at 19) seems to establish a more demanding standard than that required by proposed Guidelines.

Finally, although perhaps unintended, the government's remand request contains its own impediment to voluntary affirmative action. On the one hand, it argues that Kaiser's utilization of minorities was so low that it created a "reasonable basis" for the voluntary affirmative action plan. (Cert. Pet. at 12). At the same time, it argues that a remand pursuant to *Bakke* is necessary to permit one of the parties or an intervenor—perhaps the government, itself an intervening party in this case—to prove prior discrimination against minorities. (Cert. Pet. at 19). If the Justice Department and EEOC pursue this policy in situations where federal courts restrict voluntary affirmative action, then the candid self

analysis contemplated by the proposed Guidelines would become a vehicle of self incrimination in a belated government discrimination suit.[15]

Because of the contradictions between the Fifth Circuit's decision here and the government's attempts to define the limits of voluntary affirmative action, employers and federal contractors have little recourse but to request that this Court step in and provide some clarification.

CONCLUSION

The issues raised in this case are of undeniable importance. Until they are addressed by the Court, employers will be left in the untenable position of having to choose between lawsuits—suits filed by state or federal agencies, minorities or women for failure to establish a result or goal-oriented affirmative action program, or suits filed by nonminorities or males for actions taken pursuant to such programs if they are adopted. Federal contractors and subcontractors face a similar problem. Approval of an affirmative action compliance program by OFCCP carries no guarantee of immunity from claims of reverse discrimination, yet failure to be awarded

[15] In urging that this case be remanded, the government also contends that it is not clear from the present record whether the action taken by Kaiser and the Steelworkers was consistent with the requirements of the Executive Order. (Cert. Pet. at 16-17). This assertion, however, is ambiguous for it may be construed to mean not only that the government thinks further evidence is required, but also, that the government itself is puzzled over the applicable legal standards. In either event, the government's position here clearly lacks the certainty it expressed in its proposed Guidelines.

such approval can lead to severe penalties, including debarment from future government contracts, cancellation of existing agreements, and the possibility of additional lawsuits. Until the present situation is resolved, employers will continue to face the real prospect of defending themselves in court regardless of the employment practices they adopt.

For the reasons stated above, we respectfully urge the Court to grant the petitions herein and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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October, 1978

Supreme Court, U. S.
FILED
NOV 10 1978
MICHAEL RODAK, JR., CLERK

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October Term, 1978

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BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR URBAN LAW, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, THE BLACK AMERICAN LAW STUDENTS ASSOCIATION, INC., THE INDIAN LAW RESOURCE CENTER, THE LA RAZA LEGAL ALLIANCE, THE LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL PUERTO RICAN LAW STUDENTS ASSOCIATION and THE NATIONAL COUNCIL OF CHURCHES OF CHRIST

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
BRIAN F. WEBER, et al.,
Respondents.

BRIEF AMICI CURIAE OF THE AFFIRMATIVE ACTION COORDINATING CENTER, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR URBAN LAW, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, THE BLACK AMERICAN LAW STUDENTS ASSOCIATION, INC., THE INDIAN LAW RESOURCE CENTER, THE LA RAZA LEGAL ALLIANCE, THE LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL PUERTO RICAN LAW STUDENTS ASSOCIATION and THE NATIONAL COUNCIL OF CHURCHES OF CHRIST

INTEREST OF AMICI */

The Affirmative Action Coordinating Center (AACC) **/ is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG) with participation by a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other organizations have joined as amici in this brief.

The AACC was created in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC

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*/ This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

**/ The AACC is located at 126 West 119th Street, New York, New York 10026.

has convened a roundtable of civil rights attorneys to examine the meaning and implications of this Court's recent decision in Regents of The University of California v. Bakke, ___U.S.___, 98 S. Ct. 2733 (1978). It is producing an informational newsletter on nationwide affirmative action developments in education and employment. It has installed a national "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC is planning other activities designed to increase communication and joint efforts among all groups and individuals interested in strengthening effective affirmative action programs.

In addition to its current activities with the AACC, each sponsoring organization draws from a rich history of activities supporting civil rights.

The National Conference of Black Lawyers (NCBL) is the most progressive legal organization in the Black community. Throughout its history, NCBL has responded to legal and social issues of special impact on Black people. In 1972, NCBL established a task force on legal education to address the issue of racism in the legal profession. This task force filed a brief in defense of minority admissions programs in the case of DeFunis v. Odegaard, 416 U.S. 312 (1974), and in September, 1977, began to develop a comprehensive national strategy on the Bakke decision. The NCBL, together with the National Lawyers Guild, conducted summer research projects on affirmative action in 1977 and 1978.

The National Lawyers Guild (NLG) was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar

Association. Its historical commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962 the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as amicus curiae throughout the course of the Bakke litigation and in 1977 joined with the NCBL to co-sponsor a Bakke amici roundtable attended by forty organizations.

The Center for Constitutional Rights (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. They have litigated and done educational work designed to protect and make meaningful the constitutional and stat-

utory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos when such groups were attempting to reverse the effects of centuries of discrimination.

The Center for Urban Law, Wayne County Neighborhood Legal Services, represents persons in the Detroit metropolitan area. Its client population is composed of numerous racial and ethnic minorities unable to afford the price of conventional legal services. A large percentage of this client population is non-white and the historical victims of societal and institutional racism. Many of the clients are unemployed, underemployed, and frustrated by the employment market. Voluntary affirmative action programs of the nature instituted by the appellants have aided this client population by opening a small avenue to secure employment and other benefits. To withdraw the benefits of

these affirmative action plans just as small yet significant gains are occurring will have a devastating effect on them.

The Asian American Legal Defense and Education Fund (AALDEF) is a national organization based in New York, committed to defending the civil rights of Asian Americans through litigation and education. The issues in this case have broad significance for the Asian American community. Historically, Asian Americans have been confined to areas of employment such as restaurants, laundries and garment factories. Employment for minorities, particularly Asian Americans, requires affirmative action in recruitment and training programs to rectify past and present discrimination.

The Asian Law Caucus, with headquarters in San Francisco, is a Bay Area community organization and law office committed to protecting the civil rights of Asian Americans through litigation and education, especially among low and moderate income people.

The Black American Law Students Association (BALSA) is the representative organization of Black law students in the nation. BALSA is designed to address the concerns and interests not only of Black law students but also of the surrounding minority community. BALSA has combined these goals in a varied schedule of programs which seek to eliminate societal racial discrimination.

The Indian Law Resource Center is an educational and charitable organization based in Washington, D.C., devoted principally to the protection and enhancement of the legal rights of American Indians. One of the purposes of the Center is to seek the elimination of racial discrimination through education and legal efforts. Essential to this effort is the concept of "special measures" and affirmative action. For many years the federal government has established and implemented, albeit

imperfectly, the policy of "Indian preference" regarding employment of Indian persons by various federal agencies. The Center is vitally interested in the protection and continuing affirmation of the Indian preference policy and other measures, such as affirmative action, designed to overcome the continuing social and economic discrimination experienced by American Indians and other non-white people.

La Raza Legal Alliance (LRLA), is a national organization composed of Latino lawyers, law students and legal workers dedicated to the realization of social, economic and political equality for all Latinos. Its goal is to promote and to protect the rights of Latino people and thereby, all peoples, to a decent standard of living, a high quality of education, decent housing and equal employment opportunities.

Law Students Civil Rights Research Council (LSCRRC), is a law student organization which seeks to respond to the needs of minority and poor people in all areas of the United States. Since its inception in 1963, it has assisted the efforts of every major civil rights, civil liberties, and public interest law organization. In 1976, the LSCRRC Board of Directors mandated a sharper organizational focus on the problems surrounding affirmative action/minority admissions. The theme for its National Convention in October, 1978 was the Crisis in Minority Admissions. It has also co-sponsored two regional minority admissions conferences during the 1976-77 year, and has sponsored several LSCRRC interns working on projects concerning affirmative action in the last two summers.

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to provide legal assistance to Mexican Americans. Its headquarters are in San Francisco with additional offices in San Antonio, Los Angeles, Denver, and Washington, D.C. One of its three major areas of litigation has been employment discrimination. To this end MALDEF has litigated to decision numerous employment cases and has negotiated consent agreements similar to the one at issue.

The National Emergency Civil Liberties Committee (NECLC) was founded in 1951 for the purpose of reestablishing the constitutional freedoms then under severe attack. For 27 years, NECLC has pursued this goal through numerous test cases to vindicate the civil liberties and civil rights of citizens, including many such cases before this Court. It has also engaged in extensive educational activities in support of the constitutional rights of citizens.

The National Puerto Rican Law Students Association (National PRLSA) is the organization established by Puerto Rican and other Latino law students to represent the concerns and needs of its people before the national legal and educational communities. National PRLSA is specifically committed to the increased recruitment and admission of Puerto Ricans and other Latinos into law schools, the strengthening of our local organizations at all law schools, and the development of positive working relationships with Latino lawyers, legal workers, community organizations and undergraduate groups across the nation. National PRLSA's specific concerns emanate from its solidarity with the struggles of all minority, poor and underrepresented people of the United States to attain and preserve full socio-economic and political equality.

The National Council of Churches of Christ in the United States of America (NCC) is the cooperative agency of thirty national Protestant and Eastern Orthodox religious denominations with an aggregate membership of over forty million people. It is organized exclusively for religious purposes and is committed to promoting the application of the law of Christ in every sphere of human relations.

The Council has been active in the civil rights effort since its inception in 1950 and has filed briefs amicus curiae with this Court in several historic cases, including Jones v. Mayer (1968) and Regents v. Bakke (1977). Because its Governing Board has repeatedly supported affirmative action to eliminate the disadvantage engendered by discrimination, the Council joins this brief to urge the Court to uphold voluntary programs of affirmative action in employment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

SUMMARY OF ARGUMENT

This case reaches beyond the particular affirmative action plan at Kaiser's facilities in Gramercy, Louisiana. It threatens the national affirmative action plan adopted throughout the aluminum industry. It endangers the future of all

similarly negotiated, or where there is no union, unilaterally initiated affirmative action plans. Consequently, the case affects the vital interests of minorities and women to end their systematic exclusion from employment opportunities which this country has historically reserved for whites and men.

Affirmative action is a concept which recognizes that in the United States, discrimination on the basis of race, sex and national origin has been and continues to be so pervasive and so engrained in the institutions of this country that remedial policies which take race, sex or national origin into account are critical to achieving actual equal employment opportunity. Stated simply, affirmative action recognizes the existence of institutional discrimination in this country and is a tool to overcome it.

This Court has repeatedly recognized that we are "a Nation confronting a legacy of slavery and racial discrimination" and that there has been "a lengthy and tragic history" of societal discrimination against Blacks arising out of slavery. Regents of the University of California v. Bakke, supra, at 2750, 2755 (Opinion of Powell, J.).

The courts have contributed directly to this tragic history. In the late nineteenth century, "The Equal Protection clause was '[v]irtually strangled in its infancy by post-Civil War judicial reactionism.'" Id. at 2749 (Opinion of Powell, J.). This "Court strangled Congress' efforts to use its power to promote racial equality." Id. at 2800 (Opinion of Marshall, J.). Not only did the courts undermine legislation, but they also curtailed the protections of the Constitution.

As a result, the relics of chattel slavery continue to exist in the form of judicially sanctioned white supremacy, which until twenty-four years ago tolerated de jure segregation in all aspects of American life.

In the instant case, the logic advanced by the lower courts repeats the tragic history of the late nineteenth century. Their post war on poverty judicial reactionism would strangle in their infancy the laws governing employment discrimination. Once again the courts are being used to create a facade of equality which in fact prevents the elimination of institutionalized discrimination against non-white minorities.

A result in this case which creates the legal fiction of discrimination against whites would create a barrier to the desperately needed efforts to eliminate institutional discrimination. Such a result, amici contend, would deprive the petitioners and minority employees at the Kaiser plant in Gramercy, Louisiana, of the protection which the Thirteenth Amendment affords voluntary efforts to eliminate the badges and incidents of slavery manifested in present discriminatory employment relations.

REASONS FOR GRANTING THE WRIT

I. THE THIRTEENTH AMENDMENT PROTECTS THE RIGHT OF AN EMPLOYER AND UNION TO CONSIDER RACE IN THE SELECTION OF EMPLOYEES FOR PARTICIPATION IN A NEW CRAFT TRAINING PROGRAM ESTABLISHED TO OVERCOME THE BADGES OF SLAVERY INHERENT IN THE EXCLUSION OF MINORITIES FROM CRAFT EMPLOYMENT.

A. The Underrepresentation Of Minorities In The Skilled Crafts Is A Relic Of Slavery.

Amici contend that institutionalized racial discrimination against all non-white minority people has its historical

roots in slavery.*/ In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-43 (1968), this Court found that "herding men into ghettos" was a "relic of slavery." Amici believe that the underrepresentation of non-white minorities in the skilled crafts across this country is similarly "a relic of slavery."**/ Such present day discrimination both reflects and perpetuates the theory used to justify slavery: white supremacy.

Although slavery was ended after the Civil War by the Thirteenth Amendment, white supremacy as a reality and an idea was not. Amici assert that the Thirteenth

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*/ When amici refer to institutionalized racial discrimination, they refer to the phenomenon whereby the nation's institutions almost reflexively grant advantages to whites and impose disadvantages upon Blacks and other minority people of color. See J. Feagin and C. Feagin, Discrimination American Style: Institutional Racism and Sexism, Chap. 1-3,6 (1978).

**/ "Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice." Weber v. Kaiser Aluminum, 563 F. 2d at 216, 235-36 n.12 (Wisdom,J., dissenting).

Amendment intended not only to abolish slavery but also to reject all of slavery's "badges and incidents." Civil Rights Cases, 109 U.S. 3, 20 (1883). In order to accomplish this objective, the Thirteenth Amendment had to overrule and repudiate the statements of law and policy sanctioning slavery in Dred Scott v. Sandford, 60 U.S. (19 How.) 393(1856). That infamous case elevated to the level of constitutional doctrine the now discredited theory of the racial inferiority of the slave race. The Thirteenth Amendment, therefore, not only rejected slavery but the doctrine of white supremacy which had been generated to rationalize the subordination of an entire group of people. See generally, Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967).

Despite the passage of the Fourteenth and Fifteenth Amendments and numerous civil rights laws, badges and incidents of slavery

persisted as new substitutes for that illegal institution. One example of such a substitute for slavery was the deprivation to the former slaves of the right to make employment contracts. The right to make and enforce such contracts is one of the "fundamental rights which are the essence of civil freedom." Civil Rights Cases, supra at 29; Jones v. Alfred H. Mayer, supra at 441 n. 78. "The enjoyment or deprivation of [such rights] constitutes the essential distinction between freedom and slavery." Civil Rights Cases, supra at 30.

Even in the Civil Rights Cases, the Court recognized that disabilities to the "fundamental right to contract" were necessary incidents of slavery:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents...[D]isability to... make contracts ... and such like burdens and incapacities were the inseparable incidents of the institution. Id. at 29.

It would be ironic in the extreme if, 95 years after the Civil Rights Cases, the Court were now to disapprove contractual freedom when that freedom is utilized to overcome discrimination against the present day victims of white supremacy.

The deprivation of this right to contract was an outgrowth of and substitute for slavery and white supremacy. Cf. Jones v. Alfred H. Mayer Co., supra at 441-42. The exclusion of Blacks and other non-white minorities from the skilled trades, like slavery itself, stamps the excluded groups as inferior to whites. It reinforces the fiction that they are incapable of performing skilled work and reaffirms the white supremist status quo which cannot tolerate Blacks and other non-white minorities being trained to hold positions in which they are superior to whites. Current racial segregation of the workforce, like racial segregation of residential ghettos,

is a "relic of slavery." Jones v. Alfred H. Mayer Co., supra at 442-43.

B. Title VII And Executive Order 11246 Must Be Interpreted Consistently With The Thirteenth Amendment.

Although Title VII was not passed pursuant to the Thirteenth Amendment, the time-honored principles of this country's constitutional government require the courts to interpret all statutes and executive orders consistently with the provisions of the Constitution. If a statute or executive order is inconsistent with any portion of the Constitution, or if it is applied in such a manner as to be inconsistent with the Constitution, then it cannot stand. Marbury v. Madison, 5 U.S. 103 (1803).

Title VII, therefore, cannot be constitutionally interpreted by this Court unless the interpretation it is given fully effectuates the mandates of the Thirteenth Amendment. Similarly, under Executive Order

11246, the Presidential power to further federal interests in the procurement of goods or services must include the power to implement the mandates of the Thirteenth Amendment.

Furthermore, the Thirteenth Amendment is self-executing; it requires no implementing legislation for its enforcement:

> By its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom. Civil Rights Cases. Jones v. Alfred H. Mayer Co., supra at 439.

Because the Thirteenth Amendment is self-executing, it automatically becomes the context within which civil rights legislation must be interpreted.*/

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*/ The Thirteenth Amendment reaches private employment contracts and justifies prohibitions against racial discrimination in that context. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Jones v. Alfred H. Mayer Co., supra at 441 n. 78. While these cases upheld Congressional legislation which may be appropriate under the Thirteenth Amendment, the Thirteenth Amendment did not require legislation. It was "an absolute declaration that

footnote continued on next page.

Because the interpretation of Title VII and Executive Order 11246 advanced by the courts below hinders the achievement of the objective of the Thirteenth Amendment to eliminate the badges and incidents of slavery, it cannot be sanctioned by this Court and must be rejected.

C. Consistent With The Thirteenth Amendment, Voluntary Elimination Of The Effects of Past Discrimination Has Been Urged As A Public Policy Of The Highest Priority.

Under Title VII this Court has sanctioned racially conscious changes in seniority systems:

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footnote continued from preceding page.

slavery shall not exist in any part of the United States." Civil Rights Cases, supra at 28.

Our belief that the necessity of doing away with the badges of slavery requires findings that do not put unnecessary barriers in the path of minority litigants pursuing the right to be free of discrimination in an employment setting. See Davis v. City of Los Angeles, 566 F. 2d 1334 (9th Cir. 1977), cert. granted 46 U.S.L.W. 3775, awaiting oral argument.

> The Court has...held that a collective bargaining agreement may ...enhanc[e] the seniority status of certain employees for purposes beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 778-79 (1976).

Kaiser and the Steelworkers voluntarily instituted the racially conscious seniority system here to further the compelling national interest in eliminating the present effects of past racial discrimination, an interest which this Court explicitly endorsed in Franks:

> [T]he ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority' is certainly no less than in other areas of public policy interests. Franks v. Bowman Transp. Co., Inc, supra at 779. */

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*/ These principles,on the ability of unions and employers to reach agreement furthering the public

footnote continued on next page.

Thus, in Franks, this Court has interpreted Congressional intent to permit voluntary affirmative action under Executive Order 11246 and Title VII to further the high public policy of eliminating the current inequalities stemming inexorably from endemic past inequalities.

Furthermore, Justices Brennan, White, Marshall and Blackmun in Regents of the University of California v. Bakke, supra, have explicitly recognized the validity of this interpretation of Title VII:

> Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective

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footnote continued from preceding page.

policy objective of eliminating racial discrimination, are directly applicable to this case. Amici, however, would note their agreement with Judge Wisdom, who stated in his dissent in Weber: "The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools [by seniority] is irrelevant. supra at 235 (Wisdom, J., dissenting).

> is perfectly consistent with the remedial goals of the statute. Id. at 2775 n. 17.
>
> Thus, our cases under Title VII ... have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Id. at 2787.

Congressional support for this view was clearly established in 1972, when Congress rejected an amendment to Title VII, which would have prohibited such affirmative action. (See Petition of the United States, et al. at 15-16; see also German v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977); Cong. Rec. 1662-1674, Jan. 28, 1972, id. at 3369, Feb. 9, 1972. H.R. No. 92-2 8, U.S. Code and Admin. News, 1972 Vol. 2, 2150-52, 2172. */

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*/ Title VII has also been recognized as furthering the important interests of interracial associations. Whites are permitted to protest and recover damages for deprivation of interracial associations. Waters v. Heublein, 547 F. 2d 466, 469-70 (9th Cir. 1976); EEOC v. Bailey, 536 F. 2d 439, 452-54 (6th Cir. 1977); cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205,209-210(1972).

The right of all persons in the United States voluntarily to abolish the badges and incidents of slavery is consistent with the opinion of this Court in Barrows v. Jackson, 346 U.S. 249 (1953). In Barrows, property interests of whites seeking to enforce racial restrictions on property were set aside in order to vindicate important constitutional rights. Accord, Sullivan v. Little Hunting Park, 296 U.S. 229, 237 (1969). It has been held that whites have the right to raise the rights of Blacks "defensively as a bar to judgment against [them]." Warth v. Seldin, 422 U.S. 490, 500 n. 12, 510 (1975). Similarly, the employer and the union here should be allowed to raise defensively their right voluntarily to eliminate the badges and incidents of slavery under the Thirteenth Amendment.

The broad public policy encouraging remedial action aimed at widespread social and economic discrimination has its corollary in the area of women's rights. The judiciary has interpreted statutes to remedy societal discrimination against women and to reduce the disparity in economic conditions caused by that societal discrimination as being constitutional under the Fourteenth Amendment. Califano v. Webster, 430 U.S. 313 at 315-16 (1977). Thus, even apart from the Thirteenth Amendment context, this Court has recognized the critical importance of measures designed to overcome this nation's heritage of past discrimination.

D. The Thirteenth Amendment, Because It Reconciles Competing Legal Doctrines Regarding Racial Discrimination, Compels Judicial Approval Of The Voluntary Affirmative Action Program Challenged Herein.

Title VII creates rights for all persons to be free of employment discrimination based on race, color, religion, sex or national origin. This principle, and its parallels in other civil rights laws, did not appear on the legal landscape simply due to abstract notions of natural justice. It was passed against a factual backdrop of an aroused citizenry who no longer would tolerate systematic, pervasive and unabashed discrimination against the descendants of this nation's slaves. Although this country's race relations have undergone some positive changes since the great push for civil rights in the 1960's, overt racism still persists; covert racism is still widely

practiced; and basic ignorance of the reality of racism still flourishes. Furthermore, the effects of these past and continuing white supremacist attitudes and practices are all too apparent in any review of social and economic indicators of equality.*/

The concept of affirmative action has emerged as a critical means for remedying these many current expressions of this nation's history of slavery, white supremacy and discrimination. It is a remedial tool responding directly to this historic, negative and stigmatic use of race.

The ruling of the court below denies this history. Its premise is that all discrimination is the same, despite historical reality to the contrary. All discrimination, however, is not the same. White people simply have not, do

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*/ See, e.g. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August, 1978).

not, and will not suffer from the affirmative use of race in ways which should cause this Court to restrict affirmative action programs.

Amici contend that while respondents have rights under Title VII and Executive Order 11246,*/ respondents' rights do not outweigh a constitutional protection afforded the petitioners pursuant to the Thirteenth Amendment to implement the affirmative action plan challenged herein. Contrary to the demands of the Thirteenth Amendment, the court below would interpret Title VII so as to forbid voluntary effective measures aimed at eliminating the "badges and incidents of slavery." It would make unlawful voluntary race conscious devices designed to end the overrepresentation of whites in preferred areas of employment. It would read the law so

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*/ See McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976).

as to illegalize voluntary efforts to build a new system free of institutionalized racial discrimination which dominates employment relations in this nation.

It is the need to undo such badges and incidents of slavery which provides the basis and justification for reconciling the competing principles argued by the parties in this case. On the one hand, all people have the right not to be discriminated against on the basis of race. On the other hand, this nation is constitutionally committed to eliminating all the present effects of this nation's all too recent history of slavery and white supremacy. To achieve this end, petitioners and others like them must be permitted to use race in affirmative ways.

If respondents' Title VII rights prevailed in this instance, the Court would be interpreting that statute in a manner which would defeat rather than effectuate the

Thirteenth Amendment. Such an interpretation, amici contend, cannot be constitutional and should be immediately repudiated.

II. IN ORDER TO EFFECTUATE THE MANDATES OF THE THIRTEENTH AMENDMENT, ADMISSION OR PROOF OF PAST UNLAWFUL OR ARGUABLY UNLAWFUL CONDUCT SHOULD NOT BE REQUIRED AS A PRE-CONDITION FOR VOLUNTARY AFFIRMATIVE ACTION.

This Title VII "reverse discrimination" case, in which minorities and women were not parties, vividly presents the difficulty if not impossibility of defendants meeting a standard requiring proof or admission of past civil rights violations, or proof or admission of even arguable past violations. The Court cannot delude itself that in cases where illegal discrimination exists, the truth will always come out. This case shows that it is more than likely that the truth will not come out.

A. The Interest Of Defendants In "Reverse Discrimination" Challenges Is To Suppress And Not To Produce Evidence Of Their Own Discriminatory Acts.

There is a "smoking gun" in this case. Petitioners, the United States of America and the Equal Employment Opportunities Commission, have filed with this Court findings made in 1971 by federal compliance officers, acting pursuant to Executive Order 11246, that craft employment practices at Kaiser's Gramercy plant did not conform with the OFCC's anti-discrimination requirements. (Government's Petition, at 18). Additional findings by federal compliance officers in 1973, state that Kaiser had waived its prior experience requirements for whites but not for Blacks who had applied for craft positions. Id. Further, those experience requirements had not been validated. (1973

findings, pp. 1-2).*/

Although the "smoking gun" was not presented to the district court, there was overwhelming evidence of its existence: the repeated testimony that Kaiser and the Union were acting to conform to the requirements of Executive Order 11246 and Title VII (Jt. Ex. No. 2, p. 13, Tr. 41, 100, 104, 106, 108, 110), the glaring statistical disparity between Blacks in the skilled jobs (2%) and Blacks in the area's labor force (39%), and the absence of evidence validating the skill experience requirements.

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*/ The failure of the parties to introduce these explosive findings of racial discrimination and noncompliance with federal requirements occurred even though the EEOC monitored the trial from its inception. Tr. 9. Indeed, were it not for the petition for certiorari to this Court, and the government's resulting decision to file these critical documents with the Court, this case might have proceeded under the illusion that there had been no past discriminatory acts by the defendants.

Despite all of this evidence and its undoubted awareness of the existence of the "smoking gun," Kaiser has insisted throughout this litigation that it was completely innocent of any wrongdoing. It has consistently attributed the statistical disparities in its craft jobs to the discriminatory acts of others. Only the Union has pressed some of these arguments of possible past violations, which it now has chosen to abandon.*/

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*/ The Union argued in the courts below that the statistics created a prima facie case of discrimination which constituted a violation of Title VII by Kaiser. Brief of Petitioner United Steelworkers of America, at 3 n. 2). However, because both lower courts found that Kaiser had not violated Title VII, the Union now cites "the two-court rule" as a reason for no longer pressing its prima facie case theory. Id. The Union waives this question of law because of reliance upon a case which dealt, not with review of a conclusion of law, but solely with a question of review of a subsidiary finding of fact. Thus the rule does not apply. Cf. Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374, 1382-3 (5th Cir. 1978). Even if the question of prior discrimination were found to be purely a question of fact, the Union failed to argue that such questions may be reviewed by this Court if the findings were clearly erroneous and/or of constitutional significance . Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1961), cf. Federal Rules of Civil Procedure 52(a).

Amici believe that both the Union and the Employer have a substantial interest by their affirmative action programs to curtail liability for past discrimination and to eliminate the badges of slavery. Nonetheless,

> ... [N]o litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Weber v. Kaiser Aluminum & Chemical Corp. and United Steelworkers of America, AFL-CIO, 563 F. 2d 216, 231 (5th Cir. 1977) (Wisdom J., dissenting).

Reliance on such parties to marshal convincing evidence of their own misconduct which may give rise to civil liability and public criticism is wholly misplaced.

B. To Require As A Basis For Voluntary Affirmative Action, Anything More Than The Existence Of Underrepresentation, Which Has Its Roots In This Country's History Of Slavery And Its Legacy Of White Supremacy And Discrimination Against Non-White People, Is To Ensure That Virtually No Affirmative Action On A Voluntary Basis Will Take Place.

As this case convincingly demonstrates and simple logic confirms, it is entirely unrealistic to expect employers and unions to come forth with evidence satisfying the standard articulated by the majority in Weber below or that pressed by the United States. It is far more likely that employers and unions will attribute existing segregated areas to discrimination by others or to acts which, though discriminatory in result, nonetheless were entirely legal. Furthermore, in many cases such attribution will be entirely accurate.

If any standard substantially different from that advanced by amici were adopted,

the traditional victims of discrimination, Black people and other members of protected classes, would continue to suffer at the hands of employers and unions because of an entirely fallacious notion that white people were being discriminated against instead. This is the predictable practical result of a standard requiring proof of past, or even arguable past discrimination by a party against members of a protected class. This nation's aspirations to become truly "color-blind" are ill-served by a legal standard for voluntary affirmative action which gives the appearance of supporting the concept but which in reality undermines it.

To predicate relief from past discrimination on findings that most probably will not be requested or made is to effectively deny relief and to ensure that affirmative action will not be taken on a

voluntary basis. Not only would this have the effect of denying relief where it should be granted, but it has also an enormously chilling effect on future suits challenging such discrimination. If one or more courts have held that no prior discrimination exists at a given facility, few if any plaintiffs would come forward to attempt to prove such discrimination by those parties.

A standard which does not focus on underrepresentation would defeat the purpose of Title VII to promote voluntary remedial action. It would require individual case-by-case determinations in lieu of nationwide relief such as that obtained in the aluminum industry. It would enmesh the judiciary deeply in the internal functioning of business and labor, needlessly generate Title VII lawsuits and unconstitutionally chill affirmative action plans which are protected by the Thirteenth Amendment.

Any such standard, although facially proclaiming equality, would strangle true equality. It would repeat the legal fictions of the late nineteenth century, that such equality had been obtained. Indeed, it would go even further. It would create an historically unprecedented and unjustifiable new fiction that whites are being discriminated against because of affirmative action programs. Like the fiction of white superiority in Dred Scott v. Sandford, supra at 407-08 or like that of the "separate but equal" doctrine in Plessy v. Ferguson, 163 U.S. 537 (1883), a fiction of discrimination against whites aggravates racial inequality and deprives the American people of the opportunity to be educated about the tragic and massive scars caused by societal discrimination throughout our economy. Congress intended these scars to be eliminated by voluntary as well as ad-

ministratively and judicially compelled measures. Such an intent properly promotes the mandates of the Thirteenth Amendment and deserves immediate and unequivocal judicial recognition and sanction.

III. CONCLUSION

Amici file this brief to urge the Court to grant certiorari and summarily reverse the judgment of the court of appeals with instructions to the district court to dismiss the case. Amici are aware that the constitutional principles and factual matters discussed herein were not adequately addressed below. Therefore, should the Court believe that these important issues require fuller argument, amici would urge the Court to grant certiorari and direct the parties to address the question of the effect of the Thirteenth Amendment on the lawfulness of voluntary affirmative action programs.

Respectfully submitted,

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MOTION FILED
NOV 17 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NOS. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *Petitioner,*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL., *Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION AS AMICUS CURIAE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Government Contract Employers Association (GCEA) moves the Court for leave to participate as *amicus curiae* and file the attached brief

as *amicus curiae* in the above-entitled cause requesting that a Writ of Certiorari[1] be granted, and in support thereof states as follows:

1. Consent to the filing of a brief in this cause by the Government Contract Employers Association, as *amicus curiae,* was obtained from respondent, Brian F. Weber, and petitioners United States of America, and United Steelworkers of America, but was refused by petitioner, Kaiser Aluminum & Chemical Corporation.

2. The applicant, Government Contract Employers Association has an interest in this case in that:

(a) The GCEA is a not-for-profit association of employers doing business nationwide who contract with the Government. All GCEA members are subject to Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978).). The members of GCEA are each obligated to follow the affirmative action and non-discrimination requirements of Executive Order 11246 as well as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (hereafter "Title VII").

(b) The GCEA was formed to assist employers in resolving the tensions caused by the conflict between the regulations promulgated under Executive Order

[1] The GCEA supports the petition of the Government only to the extent that it urges the granting of the writ of certiorari. It opposes that petition insofar as it requests the Court to remand the case to the district court. If the writ of certiorari is granted, the GCEA will largely support the position of respondent Weber, and assist the Court in resolving the tension between the impermissible quotas under the OFCCP regulations and § 703(j) of Title VII.

11246 and the court decisions interpreting Title VII. The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where necessary challenging the correctness of regulations, orders, and laws designed to promote equal employment opportunity for all employees.

(c) The decision of the Fifth Circuit Court of Appeals below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private class actions by persons who may have been discriminated against because of this government mandated action.

(d) The GCEA represents a point of view of government contractors that is not being presented to the Court by any party or any other employer's association. Thus GCEA will be the only voice for government contractors in pointing out to the Court the conflict between the regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) and Title VII.[2]

(e) The GCEA is uniquely suited to bring the Court's attention to the practices and procedures under which government contractors have been

[2] Although respondent Weber has an interest in supporting the decision of the Fifth Circuit Court of Appeals, he has no overriding interest in establishing that the OFCCP regulations require employers to engage in illegal conduct under Title VII.

required to institute illegal quotas notwithstanding the government's disavowal that its requirements are in fact quotas.[3]

3. The applicant believes that the following relevant questions of law and analysis thereof may not otherwise be presented to the Court:

(a) While employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

(i) The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971), and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n. 19 (1973).

[3] Counsel for GCEA likewise presented the argument to the Court as *amicus curiae* for Chamber of Commerce of the United States of America in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), urging the correctness of a reverse discrimination cause of action.

(b) As the result of such considerations, many employers have now adopted "affirmative action" programs and are giving special consideration to race, sex, and ethnic background in their employment decisions. They are doing so because of the mandates of OFCCP. Employers engaging in affirmative action programs are of course aware—and concerned—that some of these government mandated actions may constitute discrimination in reverse.

(c) It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration why a numerical imbalance in the workforce is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____U.S. ____, No. 77-1792, decided November 13, 1978.

(d) This Court's decision in *Regents of the University of California* v. *Bakke,* ____U.S.____, 98 S. Ct. 2733 (1978), which held that a university can consider race as one factor in its admissions decisions, has left employers uncertain as to the role that racial considerations can take in the employment area.

4. Applicant is aware that this motion is late in being presented to the Court. It respectfully requests that the Court excuse this lateness however, because applicant was following the briefing schedule extended to November 13, 1978 which was granted to respondent Weber by the Court

on October 4, 1978. As we support the position of Weber, we planned to file the instant motion and brief *amicus curiae* immediately following Weber's response. The applicant has not examined or responded to any reply briefs which may have been filed with the Court.

5. In light of the substantial impact on American employers which the Court's decision in this case inevitably will have, and the complexity of the issues involved, the Government Contract Employers Association urges the Court to grant its Motion.

Wherefore, it is respectfully submitted that the Court grant leave for the Government Contract Employers Association to participate as *amicus curiae* and file the attached brief, as *amicus curiae,* in this case.

Dated this 17th day of November, 1978.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Government Contract Employers Association ("GCEA") respectfully submits this brief *amicus curiae* in support of the petitions of Kaiser Aluminum & Chemical Corporation, United Steelworkers of America, the United States of America, and the position of Brian Weber in the alternative, that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above entitled case.[1] GCEA respectfully submits that the issue to be decided in this case is whether racial quotas can be imposed not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been victims of societal discrimination.

The GCEA is a not-for-profit association of employers doing business nationwide who contract with the government. All GCEA members are subject to Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978)). The members of GCEA are each obligated to follow the affirmative action and non-discrimination requirements of Executive Order 11246 as well as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (hereafter "Title VII"). The GCEA was formed to assist employers in resolving the tensions caused by the conflict between the regulations promulgated under Executive Order 11246 and the court decisions interpreting Title VII. The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where

[1] The GCEA supports the petition of the United States only to the extent that it urges the granting of the writ of certiorari. It opposes that petition insofar as it requests the Court to remand the case to the district court. If the writ of certiorari is granted, the GCEA will largely support the position of respondent Weber, and assist the Court in resolving the tension between the impermissible quotas under the OFCCP regulations and § 703(j) of Title VII.

necessary, challenging the correctness of regulations, orders, and laws designed to promote equal employment opportunity for all employees.

The GCEA represents a point of view of government contractors that is not being presented to the Court by any other employer association; the members of GCEA will be directly affected by the outcome of the instant case.[2] The decision of the Fifth Circuit below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private class actions by persons who may have been discriminated against because of this government mandated action.

It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration why a numerical imbalance in the workforce is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____U.S.____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____ U.S.____, No. 77-1792, decided November 13, 1978.

Because the members of GCEA are subject to the conflicting demands of inconsistent government mandates, the GCEA urges the Court to grant the petitions herein. Review of this

[2] Any change in the obligations of government contractors could have an adverse effect on their current affirmative action requirements. The GCEA thus will urge that any change in these obligations, and any liability arising therefrom, be prospective only. *City of Los Angeles* v. *Manhart,* ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

case will allow the Court to begin the process of reconciling the regulations of the Department of Labor with Title VII, and to provide guidance to employers concerning the appropriate scope of affirmative action.

STATEMENT OF THE CASE

In February 1974, Kaiser Aluminum & Chemical Corporation ("Kaiser") and the United Steelworkers of America ("USWA") entered into a collective bargaining agreement which created a program for eligibility to receive on-the-job training to enter craft positions at Kaiser's plants. For purposes of the training program a two-tracked seniority list, based upon race, was created. The program provided an entrance ratio of one white to one minority worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the surrounding area of each plant. Eligibility into the program was based on seniority within the respective racial groupings. Kaiser adopted the fifty percent (50%) quota in its training program in part because of its perception of the requirements under Executive Order 11246 as interpreted by the Office of Federal Contract Compliance Programs ("OFCCP").[3] The effect of this system was to admit minority workers into the training program who had less overall seniority than some white applicants.

Brian Weber, an unsuccessful white bidder working at the Gramercy, Louisiana plant brought a class action to challenge the legality of the training program.[4] Weber alleged that by preferring black employees with less seniority for admission to the program, Kaiser and USWA violated Title VII.[5]

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[3] Opinion of the Court of Appeals, 563 F.2d 216, 218 (5th Cir. 1977). Judge Wisdom dissented from the decision. The opinion of the district court is reported at 415 F. Supp. 761 (E.D. La. 1976).

[4] 415 F.Supp. at 763.

[5] Civil Rights Act of 1964, §§701 *et seq.*, 42 U.S.C. §§2000e *et seq.*

The district court found that the program was not instituted to correct any past discrimination by Kaiser.[6] Because Kaiser did not discriminate in filling its craft positions in the past, the court held that the two-track training program was unlawful discrimination under Title VII. The court rejected the assertion that the racial quotas were a legitimate response to societal discrimination. Moreover, no one contended, and the district court found that none of the minority workers preferred over the more senior white workers was ever a victim of discrimination at the Gramercy plant.[7]

The majority of the Fifth Circuit Court of Appeals affirmed the district court. It found that "[in] the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)."[8]

With regard to the defense that Executive Order 11246 required the implementation of the race-based selection procedure, the court found "if Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition."[9]

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Concerning The Permissible Scope of Voluntarily Instituted Racial Quotas In The Employment Area Which Remain Unresolved Under The Court's Decision In *Bakke*.

The *Weber* case squarely presents the problems relating to the legality of the use of racial preferences in order to remedy past societal discrimination. In the instant case, the Fifth

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[6] 415 F.Supp. at 765.

[7] *Id* at 764.

[8] 563 F.2d at 224.

[9] *Id.* at 227.

Circuit found that any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII, unless employers or others are prepared to establish that the employer engaged in past discriminatory acts. The recent decision of this Court in *Regents of the University of California* v. *Bakke,*[10] (hereafter "*Bakke*") answered some of these questions in the context of univeristy admissions. It did not answer these questions in the employment area.

The impact of *Bakke* in employment is speculative at best for two reasons. First, the ambiguity of legislative intent under Title VI which four members of the Court in *Bakke* found sufficient to allow for remedial action to correct societal discrimination in that case is not present under Title VII. Second, the compelling state interest which Mr. Justice Powell found in *Bakke* is not present in the employment area where there is no state action, and thus the constraints of the Fourteenth Amendment are not present. *Weber* is the paradigm case to resolve these issues in employment which are left unanswered by *Bakke.*

A. The Ambiguity Of Legislative Intent Under Title VI Is Not Present Under Title VII.

In *Bakke,* an unsuccessful white applicant challenged the special admissions program of the University of California at Davis, which was designed to assure the admission of a specified number of students from certain minority groups. The Court held that state university admissions policies which are based on fixed racial quotas are illegal.

Two major issues were decided in *Bakke.* First, membership in a racial or ethnic minority does not constitutionally justify preferential treatment by the state or federal government. Second, race can be considered as one factor in giving preferential treatment if the reason for the consideration is constitutionally justifiable.[11]

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[10] ____ U.S. ____, 98 S.Ct. 2733 (1978).

[11] Kurland, *Bakke's Wake,* 60 Chi. B. Rec. 66, 82 (1978).

The opinion of Justices Brennan, White, Marshall and Blackmun found that the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities was lawful.[12] The opinion by Mr. Justice Stevens, joined by Justices Stewart, Rehnquist and Chief Justice Burger, found that any use of racial classification is strictly forbidden by the language of Title VI.[13] Mr. Justice Powell agreed with the Stevens' position that any classification based on race is subject to strict judicial scrutiny. He found that the strict scrutiny test could be met by the state's compelling interest in protecting the university's First Amendment right to establish a diverse student body. Since the university did not use the least restrictive means in satisfying this interest, however, Justice Powell found the admissions program unconstitutional.[14] Justices Brennan, White, Marshall and Blackmun decided the issues presented in *Bakke* under the statutory provisions of Title VI. *Bakke* did not answer the question of whether race-conscious considerations and quotas are appropriate under Title VII.

A majority of the Court found that Title VI is to be equated with the Fourteenth Amendment. "We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."[15] This judgment was supported in large part on the absence of

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[12] 98 S. Ct. at 2766.

[13] The substantive nondiscrimination provisions of Title VI are virtually identical to those of Title VII: No person in the United States shall on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d *et seq.*

[14] 98 S.Ct. at 2764.

[15] 98 S.Ct. at 2767, (Opinion of Justices Brennan, White, Marshall and Blackmun).

legislative history under Title VI which would prohibit preferential treatment of minorities in order to rectify past societal discrimination. This reasoning is inapposite when applied to Title VII because both the language and legislative history of Title VII forbid preferential treatment for any racial group.

During the course of the debates in enacting Title VII, grave concerns were raised that the Act, as proposed, would require employers to disadvantage whites in order to comply with the Title.[16] This objection was met by proponents of the Act, with the contention that no such treatment was intended. "[An employer] would not be obliged—or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[17] Despite these assurances, doubts as to the Act's intent persisted. Section 703(j) was inserted in the Act to alleviate these fears:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

42 U.S.C. § 2000e-2(j).

Senator Humphrey, one of the bill's drafters, commented on the purpose of § 703(j) as follows:

[16] *See eg.*, 110 Cong. Rec. 9881 (1964).
[17] 110 Cong. Rec. 7213 (1964).

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 Cong. Rec. 12723 (1964).

Although § 703(j) is phrased so that an employer is not *required* to racially balance his workforce, the prohibition on a *voluntary* balance is equally applicable, at least insofar as such balancing will injure identifiable non-minority workers. In *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976), the Court made it clear that the protection of Title VII extends to whites on the same basis as minorities. Therefore, it is incongruous to read § 703(j) to allow voluntary racial preferences when to do so will give rise to a cause of action to an injured white worker under §§ 703(a)-(d).

Justices Brennan, White, Marshall and Blackmun found the legislative history of Title VI silent as to the propriety of remedying past societal discrimination under that provision. No such inference can be made under Title VII. The language of the Act, and the legislative history make it clear that preferential treatment for minorities in employment is strictly forbidden.

B. The Compelling State Interest Found In Bakke Is Absent in Weber.

In reaching the constitutional question in *Bakke,* Mr. Justice Powell found that the requirements of the Fourteenth Amendment mandated that any use of racial classifications is suspect and can only be overcome by a compelling state interest. The compelling interest which Mr. Justice Powell found in *Bakke* is the university's First Amendment right to

establish a diverse student body. No comparable right exists in the employment area. Kaiser, in its Petition for Certiorari, attempts to find compelling interests in two areas:

> (1) an interest in action "to ensure against" discrimination which is no less substantial than in remedying past discrimination and (2) an interest in action "to assure utilization of all segments of society and the available labor pool" comparable to the public school's interest in a diverse student body.[18]

At present, no compelling interest comparable to those enumerated above has been recognized by the Court. Whether such interests are indeed compelling and sufficient to satisfy the use of outright racial quotas in the employment context are issues which are vitally important to American industry and must be resolved by the Court.

Unlike *Bakke*, the present case presents no issue of state action. Rather, this case involves action taken by purely private parties not subject to any constitutional proscription against discrimination. The question thus presented is purely one of statutory interpretation. If however, the Court should find, in the context of this case, that Title VII must have the same meaning as the Fourteenth Amendment, a definition of the interests which can overcome strict judicial scrutiny for racial classifications is imperative.[19]

The *Weber* case affords the Court the opportunity to define the role of racial preferences in employment, for this case squarely presents important questions which are unresolved under *Bakke*.

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[18] Petition for Writ of Certiorari by Kaiser, No. 78-435 at 11.

[19] *Bakke* also left open the question of the propriety of instituting racial quotas in the absence of any finding of past discrimination. The opinion of Mr. Justice Powell frequently contrasted the factors in the *Bakke* case to those cases under Title VII where quotas were imposed to remedy specific findings of discrimination. However, no guidelines

(Footnote continued on following page.)

II. This Case Presents To The Court The Opportunity To Resolve The Conflicting Demands Placed Upon Industry In Conforming Its Equal Employment Opportunity Responsibilities Under Title VII And Executive Order 11246.

A decision in the instant case is necessary to reconcile government contractors' attempts to engage in "affirmative action" as required by Executive Order 11246, yet comply with the prohibitions of Title VII that no person shall be discriminated against in employment on the basis of race, sex, religion, or national origin. As the Executive Order is currently being interpreted by OFCCP, an employer must either choose to violate Title VII or forego government contracts. This case provides the Court the unique opportunity to define a unified national equal employment policy by reconciling the express congressional intent in Title VII to ban discrimination in employment with the executive policy of promoting affirmative action under Executive Order 11246.[20]

(Footnote continued from preceding page.)

were given regarding the use of such measures when no discrimination has been found, and the result of the voluntary quotas is to deprive white workers of employment opportunities in favor of minorities who have not been found to be victims of any past discrimination.

The propriety of the use of racial quotas to remedy specific findings of past discrimination has been assumed by the courts of appeal. *See e.g., United States* v. *International Union of Elevator Constructors, Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974). The Supreme Court has never approved of such preferential treatment in the absence of such a finding.

[20] Executive Order 11246 is not facially contradictory with Title VII, rather the regulations promulgated thereunder create the conflict. See discussion, *infra.*

A. The Regulations Promulgated Under Executive Order 11246 Contravene The Express Prohibitions On Employment Discrimination Under Title VII.

The conflicting demands in Title VII and the regulations promulgated under Executive Order 11246 have placed government contractors in a quandary. On the one hand, Title VII flatly prohibits discrimination against any person because of his or her race. On the other hand, the regulations of the OFCCP, issued pursuant to Executive Order 11246 mandate that racial preferences be given to minorities regardless of any discrimination against them and despite its adverse effect upon non-minority workers.

1. The Compliance Requirements Under Executive Order 11246 Oblige Federal Contractors To Establish Racial Quotas.

The compliance requirements of OFCCP regulations under Executive Order 11246 oblige federal contractors to implement racial quotas in the guise of "goals and timetables" in order to maintain their government contracts. Indeed the court of appeals in the present case found that the one minority for one white entrant to the Kaiser craft training program was instituted to comply with the threats of the OFCCP conditioning federal contracts on appropriate affirmative action.[21] The court also correctly found that "attempts to distinguish a numerical goal from a quota have proved illusory and most such goals suggested by the OFCC can fairly be characterized as quotas." 563 F.2d at 222.

The soundness of the court's position is demonstrated by the compliance requirements of OFCCP. The regulations promulgated by the OFCCP require a federal contractor to

[21] Since the action undertaken by Kaiser and other government contractors such as the members of GCEA was predicated on regulations issued pursuant to Executive Order 11246, any relief which is granted should be prospective only. *City of Los Angeles* v. *Manhart*, ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

make a written work force analysis and develop a written affirmative action compliance program for each establishment.[22] If this utilization analysis shows that a particular employer has "underutilizations" of available minorities or women, (an "affected class"), it must develop "goals and timetables" to overcome the underutilization in the particular work group.[23] The statistical imbalances that trigger affirmative action goals and timetable requirements are not dependent upon a showing of past or present discrimination.[24] Nor does the establishment of the quota aid any identified victim of past discrimination. Yet, without any showing of past discrimination whatsoever, a federal contractor who fails to comply with the above OFCCP regulations faces the sanctions of the cancellation or termination of all federal contracts, the withholding of progress payments on a particular contract, or debarment from all future federal contracts prior to a hearing.[25] By requiring employers to adopt affirmative action programs on the basis of numerical imbalance alone, without regard to the cause of such imbalance, and then by threatening to cut off federal contracts if the imbalance is not corrected, the OFCCP has turned "goals and timetables" into quotas.[26]

[22] Revised Order Number 4, 41 C.F.R. Part 60-2.

[23] 41 C.F.R. §§ 60-2.10, 60-2.12.

[24] Hearings on § 2115, etc., before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Congress, 1st Session, 77, 88 (1971).

[25] 41 C.F.R. § 60-1.26; 41 C.F.R. § 60-2.2(b); 41 C.F.R. § 60-30. *See Crown Zellerbach Corp.* v. *Marshall*, 15 FEP Cases 1628 (E.D. La 1977); *Illinois Tool Works* v. *Marshall*, 17 FEP Cases 520 (N.D. Ill. 1978), as illustrative of the government's widespread practice of imposing the above sanctions prior to a hearing.

[26] The OFCCP's requirement that an employer establish goals and timetables without being afforded an opportunity to demonstrate that any imbalance existing in his workforce is not the result of acts of discrimination is inconsistent with the Court's decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney*, ____U.S.____, No. 77-1792, decided November 13, 1978.

The rigidity of the government's position that goals and timetables equal quotas is demonstrated by its position in support of District Judge Alfonso J. Zirpoli's order in *Legal Aid Society of Alameda County* v. *Brennan,* 381 F. Supp. 125 (N.D. Cal. 1974).[27] There the court directed that annual hiring and promotion rates, stated as percentages, *must* be equal to the percentage of minorities available in the relevant labor market. Although *Alameda* is currently on appeal by the intervenor, Chamber of Commerce of the United States of America, the government having withdrawn its appeal, continues to use Judge Zirpoli's decision to effect enforcement of quotas. *See eg., Crown Zellerbach Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La. 1977).

2. The Establishment of Racial Quotas Is Violative of Title VII and Requires Inconsistent Behavior By Employers.

The preferential treatment accorded minorities pursuant to the labor agreement between Kaiser and the union, based upon preceived OFCCP requirements, is clearly contrary to the congressional intent underlying adoption of Title VII.[28] The blatant inconsistencies between demands under Title VII and Executive Order 11246 are evidenced by the following statement of the floor managers of the bill during the debates in the United States Senate in enacting Title VII:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate intent to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.[29]

The Congressional intent in enacting Title VII was to protect all individuals.[30] That the Act's protection extends to all persons regardless of race, was confirmed by the Court in *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976).

Employers receiving government contracts who resist pressures to implement numerical goals or quotas in order to comply with Title VII invite discrimination suits and will either have to bear the expense of defense or the stigma and expense of an admission of discrimination. In many cases employers face a massive, if not insurmountable, burden to justify their selection practices if they are seen as barriers to employment of minorities, even though there is no basis for questioning their good faith. Moreover, such reluctance subjects employers to sanctions under Executive Order 11246 including debarment from all future federal contracts. As the court of appeals correctly found, the establishment of a racial quota under the auspices of Executive Order 11246 creates reverse discrimination and is flatly prohibited by Title VII.

Yet, if employers disregard the clear mandate of Title VII and implement goals or quotas, as in the present case, they are faced with claims of "reverse discrimination" and are equally subject to the burdens of back pay and other government sanctions.

Meaningful affirmative action can be accomplished without usurping the rights of non-minority workers and

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[27] In *Alameda* the court mandated the OFFCP to follow "Technical Guidance Memo No. 1 on Revised Order No. 4", which was intended to be a guide in determining when the failure to meet a goal constitutes a violation of the contractor's obligations.

[28] Note, *Title VII and Preferential Treatment: The Compliance Dilemma,* 7 Texas Tech Law Review 671, 673 (1976).

[29] Interpretive memorandum of Title VII of HR 7152 submitted jointly by Senators Clark and Case, floor managers, 119 Congressional Record 7212, 7213 (1964).

[30] Remarks of Rep. Seller, 110 Congressional Record 2579 (1964).

running afoul of Title VII. Although the Executive Order requires affirmative action, it does not require quotas. Indeed, a requirement of racial quotas to correct an imbalance in a work force imposes an unreasonable burden on the employer and upon qualified majority workers who are denied employment benefits because they are not members of a racial minority. It also contributes to racial tensions. As Judge Wisdom in the present case pointed out:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. (citations omitted).[31]

The resolution of the conflict between Title VII and the regulations promulgated under Executive Order 11246 is imperative to implement the Congressional mandate for a unified national policy of equal employment opportunity.

B. The Request By The Government For Remand Is An Attempt To Avoid The Resolution Of The Conflict Between Title VII And The Regulations Promulgated Under Executive Order 11246.

The interpretation by the government of Executive Order 11246 is in direct conflict with Title VII. Yet the government in its Petition for Certiorari is asking the Court to avoid this issue and instead remand to the district court to determine among other things, if the "facts with respect to the craft jobs at the Gramercy plant could have supported a *prima facie* finding of discrimination by the employer or the union and employer

[31] 563 F.2d at 230 (dissenting opinion).

together."[32] This is a blatant attempt by the government to avoid the illegal consequences of its interpretation of Executive Order 11246.[33]

The government had ample opportunity to establish its position in the courts below. It should not be allowed at this stage to overturn the findings of both the district court and the court of appeals that no past discrimination existed at the Gramercy plant of Kaiser. The "two-court" rule of the Court established in *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271 (1949), forbids a reconsideration of concurrent factual determination "by two courts below in the absence of a very obvious and exceptional showing of error".[34] The record is clear that no such error exists in the present case.

The issue before the Court is purely a legal question. Can racial quotas be imposed, not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been disadvantaged, at the expense of innocent white workers? The thinly-veiled attempt by the government to avoid the resolution of this question by asking for remand should be denied.

III. The Conflict Within The Circuit Courts of Appeals Requires The Resolution of The Issue Presented.

The Fifth Circuit Court of Appeals in the present case properly found that attempts to distinguish numerical goals from quotas are illusory.[35] It went on to hold that "if Executive

[32] Petition for a Writ of Certiorari of the Government, No. 78-436 at 14.

[33] See Brief of Respondent in Opposition for a Writ of Certiorari.

[34] 336 U.S. at 275.

[35] 563 F.2d at 222.

Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition". 563 F.2d at 227. In so holding, it is clear that the court of appeals would require a finding of discrimination by an employer before racial quotas can be instituted. The correctness of this position is evident in that no remedy can be imposed in the absence of a violation. Yet the decision of the Fifth Circuit is in conflict with the decisions of *Associated General Contractors of Massachusetts, Inc.* v. *Atlschuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied* 416 U.S. 957 (1974), *Southern Illinois Builders Associations* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972), and *Contractors Association of Eastern Pennsylvania* v. *Schultz,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). In the First, Third, and Seventh Circuits an employer need not be found to have discriminated before racial quotas can be imposed. This conflict between the circuits on the appropriate scope of racial quotas absent a finding of discrimination by an employer must be resolved.

Moreover, there is conflict within the circuits concerning the breadth of a remedy which includes race conscious selection procedures. The Fifth Circuit below found that remedial quotas can be imposed only to aid identifiable victims of discrimination.[36] In the Third Circuit, racial quotas as remedies can be imposed to benefit classes of persons.[37] The resolution of the conflicts between the Fifth Circuit Court of Appeals and other courts of appeal is necessary in order to allow for uniform employment practices by companies, like Kaiser and members of GCEA, which operate nationwide.

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[36] 563 F.2d at 225.

[37] *EEOC* v. *AT&T,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3803 (1978).

CONCLUSION

The dilemma facing government contractors under the current state of equal employment opportunity law is critical. Employers cannot simultaneously comply with Title VII and the regulations promulgated under Executive Order 11246. Whichever path an employer chooses he is left with potential liability to minorities, non-minorities and/or government agencies. This is an untenable position and the resolution of this conflict by the Court is essential.

For the reasons stated above the Government Contract Employers Association respectfully urges the Court to grant the petitions herein and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfullly submitted,

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November, 1978

Supreme Court, U. S.
FILED
JAN 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER, ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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County of Los Angeles v. *Van Davis* (No. 77-1553), *petition for cert. granted*	3
Crown Zellerbach Corp. v. *Marshall*, 441 F. Supp. 1110 (E.D. La. 1977), *appeal pending*, No. 77-3036 (5th Cir.), *inj. pending appeal against passover* issued October 17, 1977	7, 17
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Detroit Police Officers Assn. v. *Young*, 446 F. Supp. 979 (E.D. Wis. 1978), *appeal pending*, No. 78-1163 (6th Cir.)	24
EEOC v. *American Telephone and Telegraph Company*, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd* 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978)	6, 25, 37
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East Dayton Tool and Die Co. and Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, and Its Local 668, The, 239 NLRB No. 20, 99 LRRM 1499, *petitions for review and application for enfc't pending*, Nos. 78-2066 and 78-2261 (D.C. Cir.)	6

AUTHORITIES CITED—Continued

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East Texas Motor Freight Systems, Inc. v. *Rodriquez*, 431 U.S. 395 (1977) 3
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Florida Trailer & Equipment Co. v. *Deal*, 284 F.2d 567 (5th Cir. 1960) 23, 38
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AUTHORITIES CITED—Continued

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LeBlanc v. *Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd* 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) 36, 40
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Local 189, United Papermakers & Paperworkers v. *U.S.*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 9 (1970) 30
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Robinson v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971) 30
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AUTHORITIES CITED—Continued

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Schaeffer v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972) 41
Sledge v. *J. P. Stevens & Co.*, 585 F.2d 625, 18 FEP Cases 261 (4th Cir. 1978) 24
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United States v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 10, 23
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Wernet v. *Pioneer Foods Co.*, 6 EPD ¶ 8799 (D. Ohio 1972), *aff'd sub nom., Wernet* v. *Amal. Meat Cutters and Butcherman Local 17*, 484 F.2d 403 (6th Cir. 1973) 36

AUTHORITIES CITED—Continued

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Westinghouse Elec. Corp. and Int'l. Union of Electrical Radio & Machines Workers, AFL-CIO-CLC, 239 NLRB No. 19, Oct. 31, 1978, *petitions for review and application for enfc't pending*, Nos. 78-1769, 78-1777, and 78-1805 (4th Cir.) and Nos. 78-2067, and 78-2262 (D.C. Cir.) 6
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER, ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE *AMICUS CURIAE*

This case presents questions of great importance to employers throughout the United States, including EEAC's members, who are subject to the provisions of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e *et seq.*) (Title VII) and Presidential Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978), (E.O. 11246).[1] At issue is whether these regulatory schemes permit an employer and union to enter voluntarily into a racially-based affirmative action program designed to remedy underrepresentation of minority employees in certain segments of the employer's workforce when there has been no determination of past employment discrimination by the particular employer.

Most of EEAC's member representatives are charged with corporate responsibility for voluntary compliance with the federal civil rights laws.[2] As

[1] There are approximately 325,000 employer contractors subject to the requirements of E.O. 11246. They employ about 30 million persons. *See Major Federal Equal Employment Opportunity Programs for the Private Sector Should be Consolidated,* A Report by the Comptroller General of the United States (HRD-78-72), June 9, 1978, p. 3.

[2] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscrim-

equal employment officers of employers which, for the most part, are federal contractors, they must attempt to determine not only their federal nondiscrimination and affirmative action obligations, but also the potential liability which those requirements might create to nonminority employees and applicants who may assert that these affirmative action efforts are unfair and discriminatory.

The decision of the Fifth Circuit majority below, holding that the program adopted by Kaiser and the Steelworkers violated Title VII, illustrates and intensifies the dilemma created by these competing interests. It places employers in the position of facing potential liability to nonminority or male employees because of good faith attempts to comply with the

inatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, *e.g., The Regents of the University of California* v. *Allan Bakke,* 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Van Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters,* 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977); *Gardner* v. *Westinghouse Broadcasting Company,* 434 U.S. 984 (1978); and *Trans World Airlines* v. *Hardison,* 432 U.S. 63 (1977).

requirements found in statutes, executive orders and other government directives intended to prevent discrimination, and also to comply with regulations under E.O. 11246 and increase the utilization of minorities and women.

Since EEAC's organization, our members have engaged in continuing efforts to ascertain the permissible limits of employer affirmative action. There is a strong commitment among EEAC members to affirmative outreach and recruiting practices designed to increase the employment of minorities and women.[3] Employers differ, however, in their views as to the extent to which they may voluntarily implement numerically based programs to increase the hiring, training or promotion of minorities when the employer has not been found to have discriminated by a judicial tribunal or administrative agency, or when the beneficiaries of the preferences may not be identified as victims of such discrimination.

Because EEAC's members represent a wide variety of types of businesses, they have had both common and contrasting experiences with affirmative action. Almost all EEAC members are federal contractors and currently are implementing affirmative action plans to increase the numbers of women and minori-

[3] These include but are not limited of: contacts with minority organizations to refer minority applicants; briefing sessions and plant tours with minority applicants; participation in "Job Fairs" and other recruiting programs at schools and colleges; motivation programs; advertising in minority-oriented media such as newspapers and radio stations; and special training programs to increase the eduational and skill levels of minority employees. *See generally*, 43 F. R. 49253, § 60-2.24(e).

ties in their employ. Government contracting requirements, which are more stringent than Title VII's, compel them to adopt goals and timetables to remedy any underutilization of minorities or women in any job category, regardless of whether the imbalance is connected to any showing of past discrimination. The standards and techniques utilized by compliance officers to enforce these requirements have varied widely, especially as to the proper determination of the availability of minorities and women. See *infra*, pp. 16 & 18. Enforcement often has been so rigid that the contractors have had no real choice but to establish and reach the numerical goals through preferential employment practices or face government sanction procedures. Consequently, a broad ruling by this Court setting aside the affirmative action program in this case potentially could expose them to a barrage of reverse discrimination suits.[4]

Other EEAC members are parties to settlement or conciliation agreements, or consent decrees, which contain varying types of affirmative or preferential relief for women and minority workers. Thus, having undertaken, under court supervision or voluntarily, to change their employment practices to dis-

[4] As used here, "reverse discrimination suit" refers to the claim of a person, not a member of a class which is intended to be benefitted by affirmative action program, that he or she has been harmed by its implementation. Use of this term is not intended to imply that the particular employer involved previously has discriminated against minorities or women, or that discrimination against whites or males is governed by different standards than is discrimination against minorities. *Cf. McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); and *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 71-72 (1977).

pose of allegations of discrimination, they are deeply concerned that a ruling adverse to Kaiser in this case could subject those agreements or decrees to reverse discrimination challenge resulting in employer liability.[5]

Moreover, employers face differing reactions from unions to affirmative action efforts, especially when seniority systems must be modified or set aside. For example, in the instant case, the Steelworkers adopted a nationwide policy of preferential treatment of minorities for admissions to craft training programs. (Steelworkers Cert. Pet. at 4-5). Other unions have demanded that employers provide them with exhaustive affirmative action and other EEO-related data which the unions openly plan to use as the basis of race and sex discrimination suits against the employers.[6] By contrast, other unions have strenuously resisted remedies imposed to remedy alleged past discrimination,[7] or have objected to government demands

[5] Judge Wisdom stated below that "the majority opinion leaves in question the status of consent decrees." (Pet. App. at 26a). See also fn. 36, *infra*.

[6] See e.g., *Westinghouse Electric Corporation and Int'l Union of Electrical Radio and Machine Workers, AFL-CIO-CLC*, 239 NLRB No. 19, October 31, 1978, *petitions for review and application for enfc't pending* Nos. 78-1769, 78-1777, and 78-1805 (4th Cir.), and Nos. 78-2067 and 78-2262 (D.C. Cir.); and *The East Dayton Tool and Die Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and Its Local 668*, 239 NLRB No. 20, October 31, 1978, *petition for review and application for enfc't pending*, Nos. 78-2066 and 78-2261 (D.C. Cir.).

[7] See e.g., *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978), and especially the petitions for writs of certiorari of the Alliance of Independent Telephone Unions, the Communications Workers of America and the Telephone Coordinating Council TCC-1, International Brotherhood of Electrical Workers.

that contractors alter neutral seniority systems in a manner that would violate existing collective bargaining agreements.[8] Thus, although employers must weigh such practical considerations when attempting to determine the consequences of their approach to affirmative action, their experiences vary widely depending upon the unions with which they are required to deal.

It is clearly apparent, therefore, that EEAC's members have substantial, albeit varied, interests in the legal issues presented to the Court in this case. As a group, EEAC's primary concern is that the uncertainty about the permissible extent of voluntary affirmative action finally be resolved one way or another, so that employers will know what steps they may lawfully undertake in the future. As explained below, it is not possible for employers to find any clear guidance or direction on these issues in existing court decisions or government policy pronouncements. Indeed, as we argued in our brief supporting the petitions for certiorari (p. 16), the present state of the law is such that employers and federal contractors have little recourse but to request this Court to clarify what types of affirmative action are legally permissible.

[8] See e.g., *Crown Zellerbach Corp.* v. *Marshall*, 441 F. Supp. 1110 (E.D. La. 1977), *appeal pending*, No. 77-3036 (5th Cir.); and *International Harvester Company* v. *Marshall, et al.*, Cause No. IP 77-159-C (S.D. Ind.), temporary restraining order dated March 25, 1977.

Since its organization, EEAC's members—which comprise a broad cross-section of employer interests —have engaged in extensive discussions in an attempt to adopt a consensus position to argue in cases raising challenges to voluntary affirmative action efforts. These discussions have demonstrated that there is no unanimity of opinion among employers concerning the legality of the affirmative action program adopted by Kaiser and the Steelworkers in the instant case, or by employers in other cases. Because of this lack of agreement, we take no position on the substantive legality of the program adopted here.

On the other hand, there is a clear consensus among employers that it is essential that this Court establish standards that will clarify the permissible scope of affirmative action in private sector employment in the future and, at the same time, protect employers against liability for actions taken in a good faith attempt to carry out affirmative action obligations in the present context of legal uncertainty. Because EEAC's members' interests in this case are at once so substantial and so complex, EEAC respectfully submits this brief *amicus curiae* in an effort to assist the Court by discussing the legal and practical contexts in which affirmative action controversies have arisen and by suggesting standards by which these issues might be resolved.

THE FACTS AND DECISION BELOW

The facts of this case are fully set forth in the party briefs and decision of the Fifth Circuit. For present purposes, they may be summarized as follows. In 1974, Kaiser and the United Steelworkers of

America ("Steelworkers") attempted to cure a sizable underrepresentation of minorities in Kaiser's craft workforce by entering into an agreement establishing an entrance ratio to a craft training program at each of 15 plants.

Under the program adopted, eligible employees were divided into minority and nonminority groups. Openings were to be filled on a one-for-one basis in order of seniority from within each group. If selection for these openings had been based solely on seniority, and if race had not been taken into account, no minority employees would have been eligible to be admitted. As a result, the underrepresentation of minority employees would have continued with no foreseeable likelihood of abating.

Beginning before 1969, and continuing up until the adoption of the 1974 agreement, Kaiser was under pressure from its federal contract compliance agency to increase its utilization of minorities in craft positions in order to comply with E.O. 11246. The program was adopted at least in part out of concern for possible enforcement proceedings and sanctions by the Office of Federal Contract Compliance Programs (OFCCP). (Pet. App. 2a-3a; Kaiser Cert. Pet. at 3).[*]

Kaiser also was faced with the fact that its employees' bargaining representative, the Steelworkers, had embarked upon a nationwide program to increase the number of minority craftsmen and to award craft-training vacancies to qualified blacks and other minorities until their statistical underrepresentation

[*] "Pet. App." references are to the appendix to Kaiser's petition.

was eliminated. (Steelworkers Cert. Pet. at 4-5). The same craft training program which it negotiated with Kaiser was contained in Steelworkers' agreements with other aluminum companies, the can industry and shortly was to be included in the national steel industry consent decree. See *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Brian Weber—a white employee at the Gramercy plant who had more seniority than some blacks selected—filed a Title VII suit alleging that he had been discriminated against on the basis of his race because he had not been selected for the program. The district court agreed.

On appeal, the Fifth Circuit majority found the craft admission program violated Title VII, and ruled that "[t]here can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the [particular employer's] employment scheme." (Pet. App. 9a). The majority also rejected assertions that the training program was permissible because it was designed to correct past "societal" discrimination. (Pet. App. 16a). It reasoned that, in the absence of prior discrimination against an individual by the particular employer, a racial quota loses its character as an equitable remedy and "must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)." (Pet. App. 15a).

The majority also rejected assertions that the implementing ratio contained in the craft program could be supported independently by reliance upon E.O. 11246. It concluded, broadly, that attempts of

the OFCCP to distinguish a numerical goal from a quota have "proved illusory, and most such goals suggested by the OFCC[P] can fairly be characterized as quotas." (Pet. App. 10a).[10] The majority then held that "[i]f E.O. 11246 mandates the training program at issue here, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition [in Title VII]." (Pet. App. 21a, emphasis in original).

In dissent, Judge Wisdom stated that the standard established by the majority was too strict. In his view, the majority decision posed an impossible dilemma for employers: the choice between Title VII discrimination proceedings or E.O. 11246 sanctions if an affirmative action plan is not adopted, and the possibility of "reverse discrimination" suits by disgruntled white employees if the plan is put into effect. He would have ruled that an affirmative action plan, adopted in a collective bargaining agreement, which is a reasonable remedy for an arguable violation of Title VII, should be upheld. He felt that a zone of reasonableness, within which the employer and the union would be sheltered from liability, would encourage private settlements. (Pet. App. 28a-29a).

SUMMARY OF ARGUMENT

The Court's ruling here could do much to resolve a dilemma now facing employers. Presently, employers who fail to adopt affirmative action plans to in-

[10] On this point, the majority relied on Silberman, "The Road to Racial Quotas," Wall St. J., Aug. 11, 1977, at 12, col. 4.

crease the numbers of minorities and women in their workforces risk loss of their federal contracts, exposure to agency complaints, and widespread publicity of alleged discrimination. On the other hand, employers who do adopt affirmative action programs which give job preferences to minorities and/or women may be found to have committed "reverse discrimination" against nonminority or male employees, who can be expected to demand monetary or other relief. Employers are thereby placed in the ironic and unfair position of facing liability to nonminorities and males because of good faith attempts to comply with requirements found in statutes, executive orders or other government directives intended to prevent discrimination against minorities and women. This dilemma is compounded by a significant split in court opinion over the permissibility of preferential treatment of minorities or women who have not been shown to be individual victims of discrimination by the particular employer involved.

Guidance is required from this Court that cannot be expected from the federal enforcement agencies. EEOC's recently adopted Affirmative Action Guidelines, which would sanction the broadest forms of affirmative action even where employer discrimination has not been demonstrated, would not be binding upon courts hearing individually brought reverse discrimination suits. Moreover, the chances of court reliance upon the Guidelines is diminished by the fact that, on several points, the Guidelines appear to be inconsistent with the government's own petition in this case. The most troublesome conflict is caused by the government's position here that if there is no reasonable ground for concluding that the employer

may have discriminated in the past, a race-conscious program may, as the court of appeals stated, "lose its character as an equitable remedy and * * * be banned as an unlawful preference prohibited by Title VII." (Cert. Pet. at 11).

EEAC does not take a position on the validity of the plan in question here. However, because employers now are forced to enact affirmative action programs without benefit of any clear legal standards, we submit that even if this Court agrees in principle with the majority below, it should not "charg[e]" potential reverse discrimination defendants "with predicting the future course of [the] law." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). Rather, until the permissible limits of voluntary affirmative action are established, the entity which enacts an affirmative action plan should not be held liable to employees who allege the plan is discriminatory if the plan was adopted:

a. in a good faith attempt to comply with the requirements of federal statutes and based upon a reasonable conclusion that it might be subject to liability thereunder; *or*

b. in a good faith attempt to comply with the requirements of E.O. 11246, or its supporting regulations; *and*

c. its actions in implementing the plan were reasonably related to these good faith objectives.

These standards should be applied to affirmative action efforts undertaken voluntarily, in a collective bargaining agreement, conciliation agreement, settlement agreement, consent decree, or otherwise. More-

over, the reasonableness of the employer's affirmative action efforts should be judged under the facts and legal standards existing when the plan was enacted.

In addition, even if reverse discrimination claims are upheld, remedies available to a "reverse discriminatee" should be *prospective* only and limited to injunctions against further implementation of the offending plan or portions thereof. If this Court affirms the decision below, it should indicate that back pay or other monetary relief would unfairly penalize employers who have attempted in good faith to comply with government requirements for the increased utilization of minorities or women. As in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4351-4354 (1978)—where retroactive monetary relief was denied to known discriminatees—the employer here is faced with an unclear state of the law and is caught in a dilemma. Monetary or other retrospective remedies, therefore, would work an undue hardship on employers who had acted in "good faith" to obey the law.

ARGUMENT

I. FEDERAL AGENCY REQUIREMENTS AND POTENTIAL TITLE VII LIABILITY PROVIDE STRONG IMPETUS FOR EMPLOYERS TO ADOPT AFFIRMATIVE ACTION PLANS.

A. Regulations Enforcing Executive Order 11246 Require Contractors To Develop and Implement Goals and Timetables to Remedy Any Statistical Underrepresentation of Minorities or Women Even Where Employer Discrimination Has Not Been Demonstrated.

Undoubtedly, the most forceful stimulus to employer affirmative action is Executive Order 11246 and supporting affirmative action regulations issued by the Secretary of Labor and administered through the Office of Federal Contract Compliance Programs (OFCCP).[11] As noted above, most of EEAC's members are among the 325,000 employers who also are federal contractors.

The Order and regulations require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[12] If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. 43 F.R. 49250-51, §§ 60-2.10, 60-2.12. Government officials have stated repeatedly that, unlike Title VII, the statistical imbalances that trigger these affirmative action require-

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[11] See 43 F.R. 49240, *et seq.*, as corrected 43 F.R. 51400.

[12] Revised Order No. 4, 43 F.R. 49249, *et seq.*, Part 60-2.

ments *need not be connected to any showing of past or present discrimination.*[13]

In determining whether minorities or women are sufficiently utilized in the employer's workforce, the proportion of protected group members in that workforce is compared with the *availability* of these groups in the appropriate labor market area. A determination of such availability forms the basis for developing goals and timetables. There is, however, no common understanding of the concept within the federal sector or among interested parties in the private sector. Consequently, this causes several problem areas which complicate the enforcement of E.O. 11246. As set forth in Flanagan, Milkovich, Freeman, Bayer & Glazer, *Perspectives on Availability*, EEAC (1978), p. 3, these include:

a) The lack of a single, accepted definition of availability;

b) Uncertainty as to the proper standard of comparison;

c) Doubt as to the appropriate labor market area; and

d) The difficulty of computing availability within the confines of federal regulation.

Compare the standard of *Hazelwood* v. *U.S.*, 433 U.S. 299, 308 n.13 (1977) (qualified) *with* EEOC's Affirmative Action Guidelines, 44 F.R. 4422, 4425 ("qualified or qualifiable").

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[13] See *Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess.* 77, 88 (1971) ("Hearings"); Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971).

As a result, there often are differences of opinion between compliance and contractor personnel over whether underutilization actually exists. Nevertheless, failure to comply with agency demands subjects the contractor to severe sanctions, such as cancellation or termination of all federal contracts (or any part thereof); withholding progress payments on a contract; or, debarment from future contracts. See E.O. 11246, Section 209; 43 F.R. 49246, § 60-1.26; 43 F.R. 49249, § 60-2.2(b); and 43 F.R. 49259, § 60-30.

Even more compelling pressures on employers stem from past interpretations of OFCCP and Labor Department officials, with which we disagree, that regulations permit them to declare a contractor nonresponsible because of the alleged affirmative action program deficiencies, and then to pass over that contractor for at least two additional contracts even *before* any hearing has been held on the compliance issues.[14]

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[14] See, e.g., *Pan American World Airways* v. *Marshall*, 439 F. Supp. 487 (S.D.N.Y. 1977); *Crown Zellerbach* v. *Marshall*, *supra*, 441 F. Supp. 1110, *appeal pending*, No. 77-3036 (5th Cir.), *injunction pending appeal against passover* issued November 17, 1977; *Sundstrand Corp.* v. *Marshall*, 17 FEP Cases 432 (N.D. Ill. 1978); and *Illinois Tool Works* v. *Marshall*, —— F. Supp. ——, 17 FEP Cases 520 (N.D. Ill. 1978). These decisions cast serious doubt on the validity of the passover policy. A study by the Administrative Conference of the United States found that ". . . in practice cancellation is rarely used." The more common sanction ". . . is the declaration of nonresponsibility of an employer." The Conference also noted that, unlike the procedures leading to other sanctions, such as debarment or cancellation of a contract, "no opportunity for prior hearing is afforded in connection with a declaration of

In addition to these rigorous sanctions for not complying with OFCCP regulations, federal contractors have faced a confusing lack of standards greater than the uncertainty about their Title VII obligations. These problems were highlighted by an internal OFCCP Special Task Force created to review that agency's performance and to develop a plan for its improvement. In its Preliminary Report,[15] the Task Force observed that (Report at 147):

> [T]he nonresponsibility determination and passover concepts assume that both the Government and the contractor possess some reasonably finite knowledge of the scope and reach of equal employment opportunity law. In reality, EEO law is constantly evolving with many issues largely unsettled.[16]

The adverse consequences attendant upon the imposition of contract sanctions without definitive enforcement standards was highlighted by the Task Force, which observed:

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nonresponsibility." *See* Recommendation No. 75-2 of the Administrative Conference of the U.S., 40 Fed. Reg. 27926 (1975).

[15] "A Preliminary Report On The Revitalization of the Federal Contract Compliance Program", U.S. Department of Labor, Office of Federal Contract Compliance Programs Task Force, September, 1977 ("Report").

[16] Mr. Justice Powell in his concurring opinion in *Nashville Gas Company* v. *Satty*, 434 U.S. 136, 148 (1977), voiced the same concern in a somewhat different context when he observed that "[g]iven the meandering course that Title VII adjudication has taken, the final resolution of a lawsuit in this Court often has not been possible because the parties in the lower courts proceeded on what was ultimately an erroneous theory of the case."

> [B]ecause of latitude compliance officials have in making compliance determinations (arising largely from the absence of reasonably precise data on availability, and the absence of reasonably definitive written guidance setting forth definitions of discrimination and criteria for proving and remedying such discrimination), contractors argue that the application of the nonresponsibility and passover procedures subjects them to arbitrary and capricious decisions. [Report at 145].

In the view of the Task Force, such complaints have merit:

> [U]ntil such time as OFCCP codifies and demonstrates its ability to require rigid adherence by compliance officers to reasonably definitive and objective standards for compliance decisions the fears of contractors will remain somewhat justified. [Report at 147].[17]

A prime example of the inconsistencies faced by employers attempting to comply with the requirements of Title VII and E.O. 11246 is the OFCCP's

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[17] The Task Force found that the confusion was caused in part by the fact that the government's contract compliance program was fragmented among numerous compliance agencies spread among many different executive departments. (Report at 42-45). On October 5, 1978, President Carter signed Executive Order 12086 (43 F.R. 46501), consolidating the contract compliance program into the Department of Labor. The primary purpose of the reorganization was to provide better coordination for E.O. 11246 enforcement. As this reorganization and related personnel retraining have been undertaken only recently, however, it is too early to determine whether the problems previously seen in the program have been rectified. Past experience provides little basis for optimism as to the practical resolution of these deep-seated problems.

position that it may disregard this Court's decision in *Teamsters* v. *United States, supra*, 431 U.S. 324, and find seniority systems violative of E.O. 11246 even if they are protected from Title VII attack. See Appendix, *infra*. The agency adheres to this position even though it has been rejected by the courts. See *United States* v. *East Texas Motor Freight System, Inc.*, 564 F.2d 179, 184-86 (5th Cir. 1977); and *United States* v. *Lee Way Motor Freight, Inc.*, —— F. Supp. ——, 15 FEP Cases 1385, 1395, 1396-1398 (W.D. Okla. 1977), *appeal pending*, Nos. 78-1096, 78-1097 and 78-1098 (10th Cir.). (Order does not authorize individual seniority or back pay relief). As a result, employers may face OFCCP affirmative action demands which are directly contradictory to their *bona fide* contractual obligations.

Where such uncertainty exists in tandem with sanctions for not complying with compliance officer demands, it is not surprising that some affirmative action efforts urged upon contractors through agency pressure may be undertaken without reasoned assurance that they will withstand subsequent judicial scrutiny. Because, however, sanctions for noncompliance are so severe and the opportunities to challenge OFCCP and compliance agency policies so restricted, compliance with the agency's affirmative action requirements is generally the only practical course available to employers whose business is directly or indirectly dependent to any substantial degree on government contracts.[18]

[18] In 1971, then Under Secretary of Labor Laurence H. Silberman testified concerning the OFCCP's program that "[i]n fact we have so much clout over government contractors that very few of them are willing to or want to fight that through litigation. They usually come into compliance." See *Hearings, supra* n. 13, at 89-90. Mr. Silberman also testified that ". . . our program is not enforcement minded. The idea is that we have such tremendous sanctions that every time we go to use it, the contractor falls into compliance . . ." (*Id.*, at 90).

One district court judge has characterized the OFCCP's attempt to pass over a contractor without a hearing as "economic coercion." See *Pan American World Airways* v. *Marshall, supra*, 439 F. Supp. at 495. There, the contract, which was worth several hundred million dollars, was "vital to [the contractor's] economic vitality." (*Id.*). In ruling that the agency's passover policies were illegal, the court also noted that Pan American had no adequate remedy at law because a contractor who successfully challenged its loss of a contract award could only recover its bid preparation costs, and would be unable to receive lost profits. 439 F. Supp. at 497.

B. Prudent Employers Often Must Adopt Affirmative Action Plans to Avoid Potential Findings of Discrimination Under Federal Statutes.

This Court has stressed that the "primary" objective of Title VII is the removal of barriers to minorities "that have operated in the past to *favor* an identifiable group of *white* employees over other employees." See *Griggs* v. *Duke Power Company*, 401 U.S. 424, 429-430 (1971) (emphasis added); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). It also is clear that voluntary compliance is the "preferred means" of eliminating employment discrimination (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)), and that employers are required to "self-examine and to self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges of their discriminatory practices." (*Teamsters* v. *United States, supra*, 431 U.S. 364).

Employers who analyze their workforce statistics and determine that there may be potential Title VII liability may conclude that affirmative efforts are required so that their workforces more closely mirror the racial or sexual composition of the workforce in the appropriate labor market. Such a reaction would be most likely from employers who find it would be difficult to rebut a *prima facie* case of discrimination under standards established by this Court,[19] or from those (like Kaiser) whose initial affirmative efforts to increase utilization of minorities have been unsuccessful.

Even when it is not certain that an employer has discriminated, a self analysis of the surrounding circumstances may lead it to conclude that affirmative action efforts should be undertaken voluntarily, through settlements or by consent decree. Several factors are relevant such as: a desire to remedy the effects of past discrimination, the possibility of time consuming and costly processing of discrimination complaints, the uncertainty of the outcome of litiga-

[19] See *Int'l. Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 340; *Hazelwood School District, et al.* v. *United States, supra,* 433 U.S. 299; *Furnco Construction Corp.* v. *Waters,* 46 U.S.L.W. 4966 (1978); and *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330, 18 FEP Cases 520 (1978). Under these standards, an employer need only articulate "some legitimate, nondiscriminatory reason" for its conduct in order to rebut a Title VII *prima facie* case. See *Board of Trustees* v. *Sweeney, supra,* 47 U.S.L.W. at 3331. This standard contrasts markedly with the requirements of E.O. 11246 regulations that any underutilization of minorities or women must be rectified, regardless of whether it was caused by discrimination. See *supra,* pp. 15-16.

tion, as well as a desire to avoid wasteful and expensive litigation. The public policy of encouraging voluntary compliance could hardly be achieved if such actions were permitted only when discrimination could be established to a certainty.[20]

Furthermore, employers are aware that a large majority of the United States Courts of Appeals have considered it within their equity jurisdiction to approve the use of accelerated hiring goals or quotas to eliminate the effects of past proven discrimination. See *Van Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted,* No. 77-1553, 46 U.S.L.W. 3780 (1978), *decision pending,* and cases collected therein. Although these decisions do not involve voluntary affirmative action efforts, they provide some indication that positive efforts may be required to overcome the effects of past employer discrimination.

From the foregoing, it is evident that federal statutory, judicial or administrative employment standards and enforcement requirements have had an important effect on increasing employer affirmative action efforts. In fact, there may be compelling reasons for employers to increase their utilization of minorities and women even when they do not believe they have engaged in past discriminatory practices. As we now show, however, their attempts to comply with government requirements have placed employers

[20] See *Florida Trailer & Equipment Co.* v. *Deal,* 284 F.2d 567, 571 (5th Cir. 1960). Cf. *United States* v. *Allegheny Ludlum Industries,* 517 F.2d 826, 11 FEP Cases 167, 186, 192 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

in the unfair position of having to face potential liability to white, male or other persons alleging they have been harmed by those affirmative action efforts.

II. COURT DECISIONS RAISE DOUBTS ABOUT THE PERMISSIBLE LIMITS OF AFFIRMATIVE ACTION AND CREATE A DILEMMA FOR EMPLOYERS THAT ONLY THIS COURT CAN RESOLVE.

A. Conflicting Lower Court Decisions Provide No Clear Guidance to Employers Seeking to Comply Voluntarily With Title VII and E.O. 11246.

The majority and dissenting opinions of the court below have increased the uncertainty over whether affirmative action programs adopted to remedy underutilization of minorities in an employer's workforce are permissible under Title VII and E.O. 11246 in the absence of findings that an employer has engaged in acts of past discrimination against the specific identified individuals who are beneficiaries of the program. The decision below requires employers to establish findings that they have engaged in discriminatory practices and then limit preferential treatment to identifiable victims of their discrimination.[21] In other contexts, however, other courts of appeals have suggested that preferential affirmative class relief is not necessarily limited to identifiable

[21] See also *Detroit Police Officers Ass'n* v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978), *appeal pending*, No. 78-1163 (6th Cir.); *Hiatt* v. *City of Berkeley*, 18 FEP Cases 233 (Cal. Ct. App. 1978); and *Hull, et al.* v. *Cason, et al.*, 1 Civ. Nos. 38801, 40034, 41036 (Cal. Ct. App., December 28, 1978). Cf. *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 18 FEP Cases 261, 275 (4th Cir. 1978) ("Our reading of the several opinions in [the *Bakke* case] indicates that the imposition of hiring quotas in Title VII cases is still an open question . . .").

victims. See *e.g.*, *Carter* v. *Gallagher*, 452 F.2d 315, 328-330 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); *EEOC* v. *American Telephone & Telegraph Co.*, *supra*, 556 F.2d 167, 175-176; *Van Davis* v. *County of Los Angeles*, *supra*, 566 F.2d 1334, 1343; and *IBEW Local 35* v. *City of Hartford, et al.*, —— F.Supp. ——, 18 FEP Cases 1338 (D. Conn. 1978).[22]

Additionally, the Fifth Circuit held below that the underutilization of minorities in craft positions was not a legally sufficient reason to permit the racial preference. (Pet. App. 16a-17a). Kaiser argued that its craft admission plan was justified by the disproportionately small share of its workforce held by minorities and its knowledge that its requirement for prior experience for craft applicants had a "disparate impact" on blacks because of their former exclusion from craft unions. (Kaiser Cert. Pet. at 4-5). The Fifth Circuit, however, found that under the circumstances of this case, the remedial plan "could not be approved even if it had been judicially imposed." (Pet. App. 14a).[23]

[22] Similarly, the *Bakke* opinions of Justices Brennan and Powell disagreed over whether the Constitution permits a state institution to afford minority group members preferential treatment to remedy past societal discrimination when there has been no showing that the institution itself engaged in discriminatory practices.

[23] See also *Lewis* v. *Tobacco Workers*, 577 F.2d 1135, 17 FEP Cases 622, 627 (4th Cir. 1978), *cert. denied*, No. 78-696, 47 U.S.L.W. 3449. ("... § 703(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance."). *Cf.*, *Furnco Construction Corp.* v. *Waters*, *supra*, 46 U.S.L.W. at 4970.

By contrast, in *Prate* v. *Freedman*, 583 F.2d 42, 46-47 (2d Cir. 1978), the Second Circuit approved a consent judgment establishing a plan for preferential hiring of minority groups. Although there were no findings or admissions of past employer discrimination, the court stated that a decree "designed to remedy the disproportionate impact of prior employment practices amounted to an admission of unlawful discrimination." 17 FEP Cases at 1575-76. Indeed, in rejecting challenges to the decree by white police applicants, the court awarded attorneys fees to the parties defending the hiring preference, and characterized the plaintiffs' suit as "unreasonable and vexatious."

Recognizing the split in court authority, Judge Wisdom pointed out in his dissenting opinion below that (Pet. App. 26a-27a):

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albermarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 422-23, 95 S. Ct. 2362, 45 L. Ed. 280.[24]

[24] As discussed below, however, there are several considerations that would make back pay to reverse discriminatees an inappropriate remedy. See *infra*, pp. 38-41.

It also was noted that "[d]ifferent courts may apply the law in arguably proper distinct ways," and that determining the result a court would reach in any Title VII litigation is "no small problem" (Pet. App. 26a). Because of the potential for varying circuit court interpretations of the validity of affirmative action programs, voluntary compliance with Title VII, especially by way of nationwide collective bargaining, is rendered particularly difficult. (Pet. App. 26a).

Given these conflicting judicial interpretations of Title VII, employers and unions attempting to comply voluntarily with Title VII take the chance of being liable "unless they instituted exactly what a reviewing court felt should have been instituted." (Pet. App. 27a). Their alternatives, therefore, would be to "either bring declaratory judgment actions, or wait to be sued." (*Ibid.*) Without guidance from this Court, however, such additional litigation not only would be burdensome, but unlikely to provide sufficient clarification for employers whose operations are not located solely within one judicial circuit.

B. Guidance From the Federal Enforcement Authorities is Insufficient to Clarify the Issues.

In an attempt to resolve the employers' dilemma and to spur employers to undertake more aggressive voluntary affirmative action, EEOC has issued its final Affirmative Action Guidelines.[25] Under the Guidelines, EEOC would make a determination of "no reasonable cause" concerning "reverse discrimination" charges filed with it if an employer could

[25] 44 F.R. 4422, January 19, 1979.

demonstrate that its self analysis provided a reasonable basis to conclude that affirmative action is "appropriate" and the action taken has a reasonable relationship to the problems revealed by the self analysis. Affirmative action efforts taken in accordance with E.O. 11246 also will qualify under the Guidelines. 44 F.R. 4423-24, 4428.[26] Further, the Guidelines state that:

> It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action. [Guidelines, Section 1608.4(b)].

They also provide:

> [The AAP may be adopted] *regardless of whether the persons benefitted were themselves the victims* of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination. (Emphasis added). [Guidelines, Section 1608.4 (c)].

EEOC would permit interim goals which are *higher* than the workforce *availability* of protected groups, as long as those selected are "qualified or *qualifiable* applicants." (Emphasis added). 44 F.R. at 4425.

EEOC acknowledges that its Guidelines directly conflict with the majority decision below (44 F.R. at 4425 n.1). The Guidelines, however, only provide assurance against reverse discrimination suits brought by EEOC. Upon receipt of a "no reasonable cause" determination from EEOC, the alleged reverse discriminatee could obtain a right to sue notice from the agency and bring a private lawsuit.[27] In that proceeding, the Guidelines will not have the force and effect of law, nor will they be controlling upon the court,[28] especially in view of the Commission's past limited interpretations of Section 713(b) of Title VII. That provision—the primary legal authority for the Guidelines—provides a defense to Title VII liability to a respondent who acts in good faith reliance on any written interpretation of the Commission. In our view, the protections of Section 713(b) should be

[26] It should be noted that in a recent advisory opinion, a Department of Labor Administrative Law Judge concluded that in light of the *Bakke* decision of this Court and the Fifth Circuit's decision below in *Kaiser* v. *Weber*, there is a substantial question of law as to whether the imposition of goals and timetables under E.O. 11246, absent a finding of discrimination, conflicts with the Constitution and Title VII. See Advisory Opinion of Administrative Law Judge Burton Sternburg *In the Matter of Firestone Synthetic Rubber & Latex Co., Orange, Texas*, Case No. 78-OFCC-13, December 8, 1978, Daily Labor Report No. 243, December 18, 1978, at F-1. In his decision, the judge noted that the government's petition for certiorari in the instant case indicated that the establishment of quotas and/or preferences absent a finding of discrimination may be illegal. A further discussion of the government's petition is set forth below at pp. 31-33. Cf., Silberman, *supra*, n. 10.

[27] See Section 706(f)(1) of Title VII; and *Occidental Life Insurance Company of California* v. *EEOC*, 432 U.S. 355, 360-361 (1977).

[28] *General Electric* v. *Gilbert*, 429 U.S. 125 (1976); *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *City of Los Angeles* v. *Munhart*, 46 U.S.L.W. 4347, 4352 n. 36 (1978) ("[the District Court] should not have given conclusive weight to the EEOC Guideline.")

construed liberally.[29] But past EEOC interpretations have stated that opinion letters must set forth the stated factual assumptions of the individual case, and may be relied upon only by the specific addressees.[30] By contrast, the Guidelines purport to sanction virtually all forms of affirmative action, even though specific programs need not be reviewed or approved by EEOC until *after* the plans are put into effect and a reverse discrimination charge is filed.

Another point overlooked by EEOC is that Section 713(b)'s protections apply only to Title VII. There is no assurance, therefore, that the Guidelines would protect employers against reverse discrimination suits brought under 42 U.S.C. § 1981 or other sections of the Civil Rights Act of 1866 (see *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, *supra*, 427 U.S. 273)), or under state antidiscrimination statutes (see *e.g.*, *Hiatt* v. *City of Berkeley*, *supra*, 18 FEP Cases 233).

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[29] See e.g., *Yott* v. *North American Rockwell Corp.*, 428 F. Supp. 763, 768 (C.D. Cal. 1977) (". . . the EEOC cannot by regulations or otherwise put a limitation on who can claim [Section 713(b)'s] benefits.") See also footnote 36, *infra*, concerning consent decrees and Section 713(b).

[30] See 29 C.F.R. §§ 1601.31, 1601.32 and 1601.33; EEOC Policy Statement, 35 F.R. 18692, December 9, 1970; EEOC Decision No. 75-147, January 13, 1975, 2 CCH Employment Practice Guide ¶ 6447; and EEOC Decision 74-76, January 18, 1974, CCH Employment Practice Guide ¶ 6446. Cf. *Local 189, United Papermakers* v. *U.S.*, 416 F.2d 980, 987 (5th Cir. 1969), *cert. denied*, 397 U.S. 919; *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991; and *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006. On January 19, 1979, EEOC redefined "written interpretation or opinion of the Commission" to include a no reasonable cause determination issued pursuant to the Guidelines. See 44 F.R. 4429-30.

In addition, inasmuch as the Guidelines would permit individual employer affirmative action even when there is no evidence sufficient to prove the employer violated Title VII, and before there is a related finding of discrimination "by judicial, legislative, or administrative bodies with competence to act in this area,"[31] there also are questions raised as to whether the Guidelines comply with the standards of the *Bakke* decision.[32] Thus, the Guidelines are inadequate to provide assurance against employer reverse discrimination liability in a private Title VII suit.

Even more confusion is added when the government's petition for certiorari is compared with the Guidelines. In the Guidelines, EEOC and the Solicitor General state that the decision below is "incorrect" and that "the affirmative action program there was lawful." 44 F.R. at 4425 n.1. Moreover, EEOC's Guidelines assume that preferential treatment may be given to "qualifiable" persons who are not identified as victims of discrimination, and where past discrimination by the employer has not been shown. In their petition, however, the agencies set forth a different legal standard (Cert. Pet. at 11):

> In our view, Title VII permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding

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[31] *See The Regents of the University of California* v. *Bakke*, *supra*, 98 S. Ct. 2757-2758, 2766 (Opinions of Justices Powell and Brennan).

[32] In the Supplementary Information accompanying the Guidelines, EEOC concludes without analysis that the Guidelines are consistent with the *Bakke* decision. But its rationale states only that in *Bakke*, the University did not assert reliance "on any detailed guidance and procedures for crafting an affirmative action plan." 44 F.R. at 4425.

> that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question. Where there is no reasonable ground for concluding that the employer may have discriminated in the past, a race-conscious program may, as the court of appeals stated, "lose its character as an equitable *remedy* and * * * be banned as an unlawful racial *preference* prohibited by Title VII" (App. A, *infra*, p. 18a). (Emphasis in original).

And whereas the Guidelines state that "[i]t is not necessary that the self analysis establish a violation of Title VII," and need only show that affirmative action is "appropriate" (see *supra*, p. 28), the government's petition asks this Court to remand the case to the district court for another hearing to determine whether there is any evidence, not now in the record, of discrimination by either of the party defendants (U.S. Cert. Pet. at 11, 15-17, 19-20). By obvious implication, the government's request means—in contradiction to the Guidelines—that clear evidence of discrimination and not just underutilization of minorities, may be necessary to support a voluntary affirmative action program. And although the government's petition states that discrimination need not always be established in court to support voluntary affirmative action (Cert. Pet. at 11), the evidence it asserts would be required on remand (Cert. Pet. at 19) seems to establish a more demanding standard than that required by the Guidelines.

Adding another bit of inconsistency, EEOC's explanation of the Guidelines criticizes the decision below, finding it "fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance

with government requirements. . . ." (44 F.R. at 4425). The government's petition, on the other hand, urges that this case should be remanded, arguing that it is not clear from the present record whether the action taken by Kaiser and Steelworkers was consistent with E.O. 11246 (Cert. Pet. at 16-17).

When the primary government agencies charged with enforcing the federal civil rights statutes are unable to agree upon the appropriate legal standards governing affirmative action, it hardly seems reasonable to expect that courts would defer to Guidelines that do not represent a uniform view. It then follows that employers could not rely upon the government's Guidelines with any degree of confidence.

III. THE COURT SHOULD FORMULATE PRINCIPLES THAT PROVIDE GUIDANCE FOR EMPLOYERS WHO MUST RECONCILE AFFIRMATIVE ACTION REQUIREMENTS WITH POTENTIAL REVERSE DISCRIMINATION LIABILITY.

A. The Liability Standards Which Should Govern Voluntary Affirmative Action.

The dilemma described above can only be resolved by this Court. Until guidance is given, employers will face the prospect of lawsuits from competing interests. On the one hand are investigations and suits from state or federal EEO agencies, minorities or women for failure to establish resulted-oriented affirmative action programs; on the other are suits filed by persons alleging they have been harmed by the affirmative action plans. The same problem confronts federal contractors who face sanctions for not complying with OFCCP demands but have no clear immunity from claims of reverse discrimination. In

our view, it does not follow inexorably that an affirmative action plan found to discriminate against nonminorities should result in *liability* being assessed against an employer. The resolution of this dilemma is basically a question of equity, and

> "In equity as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . ." *Lemon* v. *Kurtzman*, 411 U.S. 192, 201 (1973) (Burger, C.J.)[33]

One way to resolve the dilemma, of course, would be for the Court to reverse the Fifth Circuit below and hold that the *voluntary* affirmative action program of Kaiser and the Steelworkers did not violate Title VII. Arguments for or against that position are not advanced here but will be presented fully by the parties and other *amici*.[34]

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[33] Accord: *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777-778 n. 38, 789-780 (1976) (Opinions of Justices Brennan and Powell).

[34] In this regard, EEAC submits that the issues presented in this case involve the permissible limits of *voluntary* affirmative action. That issue, however, is distinguishable from the separate question of whether employers may be *compelled* by the government to undertake preferential numerically based relief to remedy societal discrimination. Our reading of this Court's decisions indicates that where past discrimination by a specific employer has not been shown to have been a factor contributing to a racial imbalance between an employer's workforce and the workforce in the appropriate labor market, preferential hiring of minorities to cure the imbalance cannot be required. As stated in *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. at 4970, the obligation imposed upon employers is to provide "an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work-

On the other hand, should the decision below be affirmed, limits should be placed on reverse discrimination liability. Because employers are faced with unprecedented confusion over the applicable legal standards, we submit that this Court should not "charg[e]" potential reverse discrimination defendants "with predicting the future course of [the] law." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).[35]

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force." See also *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 ("In short, the Act does not *command* that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.) (Emphasis added).

Indeed, even the *Bakke* opinion of Mr. Justice Brennan, which was strongly supportive of voluntary affirmative action, stated that ". . . Title VII clearly *does not require* employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own . . ." 98 Sup. Ct. at 2775 (emphasis added). Justice Brennan noted, however, that such an objective was consistent with the remedial goals of the statute. Along similar lines, Judge Wisdom stated in his dissent below that "[w]hile the government *might not be able to require* that restorative justice be done, neither should it prevent it." (Pet. App. at 38a) (emphasis added.)

Finally, this Court's school desegregation decisions also support this distinction. *See e.g., Swann, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 16 (1971) ("To [prescribe a ratio of Negro to white students reflecting the proportion for the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authortiy of a federal court.") (Emphasis added). *Accord, Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); and *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977).

[35] The holding of *Pierson* v. *Ray* has been cited specifically in several Title VII cases as authority for denying back pay

Fundamental principles of fairness indicate that until the permissible limits of voluntary affirmative action are established, the entity which enacts an affirmative action plan should not be held liable to an employee who alleges the plan is discriminatory as to him or her, if the plan was adopted:

a. in a good faith attempt to comply with the requirements of federal statutes and based upon a reasonable conclusion that it might be subject to liability thereunder; *or*

b. in a good faith attempt to comply with the requirements of E.O. 11246, or its supporting regulations; *and*

c. its actions in implementing the plan were reasonably related to these good faith objectives.

Application of these standards should not require that an employer admit a Title VII violation, or await a judicial determination of liability. Requiring admissions of discrimination would invite suits from minorities or women and discourage voluntary compliance. Requiring an official finding of discrimi-

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claims when employers had acted in good faith attempts to comply with existing statutory requirement. *See, e.g., Ridinger* v. *General Motors*, 325 F. Supp. 1089, 1098 (S.D. Ohio 1971), *aff'd in rel. part after remand*, 7 EPD ¶ 9395 (S.D. Ohio 1973); *LeBlanc* v. *Southern Bell Telephone and Telegraph Co.*, 333 F. Supp. 602, 611, (E.D. La. 1971, *aff'd*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Wernet* v. *Pioneer Foods Co.*, 6 EPD ¶ 8799 (D. Ohio 1972), aff'd sub nom., *Wernet* v. *Amalgamated Meat Cutters and Butcherman Local 17*, 484 F.2d 403 (6th Cir. 1973); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 341, 2 EPD ¶ 10,001 (D. Ore. 1969). *See also Hupart* v. *Board of Higher Education*, 420 F. Supp. 1087 (S.D.N.Y. 1976). *Cf. Wood* v. *Strickland*, 420 U.S. 308, 319-22 (1975).

nation would strain the resources of our legal system and impede employers from increasing their utilization of minorities or women until actually charged and found guilty of discriminating against them.

These standards for relief from liability should be applied to affirmative action efforts undertaken voluntarily, in a collective bargaining agreement, conciliation agreement, settlement agreement, consent decree,[36] or otherwise. Moreover, an alleged reverse discriminatee should not be able to premise liability upon a consent decree whose provisions would have been sustainable when enacted. As noted above, p. 18 and n. 16, civil rights principles are changing rapidly, and it would be unfair to base subsequent reverse discrimination liability upon later legal developments which might have lessened the possibility of liability to minorities or women had those principles been in

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[36] As this Court stated in *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 423 n. 17, Title VII itself recognizes a complete, but very narrow immunity for employer conduct shown to have been taken 'in good faith, in confirmity with, and in reliance on any written interpretation or opinion of the [EEOC].' [Section 713(b)] 42 U.S.C. § 2000e-12(b)." It recently has been found that a consent decree and its accompanying documents "certainly constitute such an interpretation or opinion." See *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022, 1055 n. 34, (E.D. Pa. 1976), *aff'd EEOC* v. *American Telephone & Telegraph Co.*, *supra*, 556 F.2d 167.

We note also that in his *Bakke* opinion, Mr. Justice Powell stated that "[t]his case does not call into question congressionally authorized administrative actions such as consent decrees under Title VII . . ." See 98 Sup. Ct. at 2755 n. 41. Section 713(b) is discussed also *supra*, at pp. 29-30.

effect when the decree was approved. See e.g., *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977).[37]

B. If Reverse Discrimination Claims Are Permitted, Remedies Should Be Prospective Only.

Our position that equitable principles should be applied to limit employer reverse discrimination liability is supported by analogous decisions of this and other Courts holding that back pay awards are not appropriate under certain circumstances. These decisions, discussed below, also support a conclusion that even if reverse discrimination claims are upheld, remedies available to a "reverse discriminatee" should be *prospective* only and limited to injunctions against further implementation of the affirmative action program. We submit, therefore, that if this court affirms the decision below, it should indicate that back pay or other monetary relief to reverse discriminatees would unfairly penalize employers who have attempted in good faith to comply with government

[37] It is a well understood principle that voluntary action, settlements and consent decrees are entered into with an awareness on all sides that a degree of uncertainty is to be expected and that a settlement should not be judged on whether its terms are the equivalent of what could have been obtained after a full trial. See *United States* v. *Armour Co.*, 402 U.S. 673, 681-682 (1971); *Florida Trailer and Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960); and *Cotton* v. *Hinton*, 559 F.2d 1326, 15 FEP Cases 1342, 1344 (5th Cir. 1977). Moreover, certain courts have rejected attacks on Title VII consent decrees based on later substantive Supreme Court holdings. *Stewards* v. *American Airlines*, —— F.2d ——, 17 FEP Cases 24, 27 (7th Cir. 1978); and *EEOC* v. *Bethlehem Steel Corp.*, —— F. Supp. ——, 16 EPD (CCH) ¶ 8245 (W.D.N.Y. 1978), pp. 5268-69.

requirements for the increased utilization of minorities or women.[38]

The decision in *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421, held that back pay may be denied when its award would frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Recently, those principles were applied by this Court when it denied retroactive monetary relief to known discriminatees. See *City of Los Angeles* v. *Manhart*, *supra*, 46 U.S.L.W. at 4351-4354 and n. 38. Several factors were stressed. First, the defendants did not have the benefit of a clear definition of the law and may have assumed that their program was lawful. Further, the employer was "in a dilemma: he [was] damned in the discrimination context no matter what he [did]." (*Id.*, 46 U.S.L.W. at 4352, n. 38). Moreover, had the employers changed the practices ultimately found illegal, a profound effect on the economy would have resulted.[39] Finally, the decision noted the unfair possibility that staggering damage awards would work a hardship on an employer who had

[38] Monetary awards are not involved in the instant case. Judge Wisdom, however, noted that damage claims are likely. (Pet. App. 26a-27a). Other cases also indicate such claims are a foreseeable possibility. See *McAleer* v. *American Telephone & Telegraph Co.*, 416 F. Supp. 435 (D.D.C. 1976), *opinion withdrawn*, 13 EPD ¶ 11,624; and *Hupart* v. *Board of Higher Education*, *supra*, 420 F. Supp. at 1108.

[39] In the instant case above, the Steelworkers state that the program at issue has been negotiated into contracts affecting nearly one million employees in a major industry. (Steelworkers Cert. Pet. at 10).

acted in "good faith." (*Id.*, at n. 44). For the reasons stated throughout this brief, these conclusions also apply to employer potential reverse discrimination monetary liability.[40]

Numerous lower court decisions also support this conclusion. The Fifth Circuit has suggested that where discrimination is "government imposed" by the OFCCP, a back pay order would work a "substantial injustice" and should be carefully scrutinized by the district court. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 113-114 (5th Cir. 1975).

Similarly, virtually all courts considering the issue have found back pay to be an inappropriate remedy where employers' good faith reliance upon a state protective statute ultimately was found to constitute unlawful Title VII discrimination.[41] These cases reveal several factors analogous to the affirmative action context. They consistently emphasize the "di-

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[40] Accord: Mirengoff, "*Weber* v. *Kaiser*, Impact and Alternatives" Equal Employment Practice Guide, Federal Bar Association, October, 1978, 220, 226.

[41] *See, e.g., Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 692 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Tuma* v. *American Can Co.*, 373 F. Supp. 219 (D.N.J. 1974). *Accord, Stryker* v. *Register Publishing Co.*, 423 F. Supp. 476 (D. Conn. 1976), and cases cited therein at n. 2. See also fn. 35, *supra.*

Although this Court indicated it was not ruling on this issue, many of these cases were cited in *Albemarle Paper*, 422 U.S. at 423 n. 18.

lemma"[42] facing employers who did not have the benefit of a definitive judicial or even quasi-judicial determination as to the validity of their course of action.[43] They also point out that "[p]rior to a judicial determination, such as evidenced in this opinion an *employer can hardly be faulted* for following the explicit provisions of applicable state law." (Emphasis added).[44] The equitable relief from monetary damage liability requested here is *prospective* in application,[45] would be limited in nature,[46] and need not be extended to affirmative action plans adopted *after* this Court ultimately determines the extent to which race- or sex-conscious employment decisions are statutorily, constitutionally or otherwise permissible.

CONCLUSION

In recognition of the facts and arguments presented above, it is respectfully submitted that the administration of the federal antidiscrimination statutes and executive programs would benefit greatly if this Court were to adopt the standards suggested by

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[42] *See, e.g., Kober* v. *Westinghouse*, 480 F.2d at 249; and *Manning* v. *International Union*, 466 F.2d at 816.

[43] *Kober* v. *Westinghouse*, 480 F.2d at 249; and *Tuma* v. *American Can Co.*, 373 F. Supp. at 231.

[44] *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971); *Williams* v. *General Foods Corp.*, 492 F.2d at 408.

[45] *Burns* v. *Rohr Corp.*, 346 F. Supp. 994, 999 (S.D. Cal. 1972).

[46] *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1007 (9th Cir. 1972).

the *Amicus*. Such guidance from this Court would do much to eliminate the present confusion surrounding employers' obligations to undertake affirmative action to remedy instances of underutilization of minorities and women.

Respectfully submitted,

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APPENDIX

July 20, 1977, policy clarification memorandum of Weldon Rougeau, the Director of the Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, reported at Daily Labor Report No. 146, July 28, 1977, pp. A-10 through A-11 (BNA):

> We have analyzed the Supreme Court's opinion in *Teamsters* v. *United States* and have concluded that the opinion is not applicable to Executive Order 11246, as amended.
>
> The Executive Order program long has held that seniority systems which perpetuate the effects of past discrimination with respect to minority and female employees who had been hired and assigned to lower paying and less desirable jobs were a violation of the Executive Order. The Supreme Court's opinion states that such practices do not violate Title VII if they are pursuant to a *bona fide* seniority system. The linchpin of the Court's reasoning and holding is § 703(h)* of Title VII. The opinion expressly states, for example, that "were it not for § 703 (h), the seniority system in this case would seem to fall under the *Griggs* rationale."
>
> As you are aware, the Executive Order does not contain an exemption comparable to § 703(h), and our review of the Teamsters case is that it

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* [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * * or national origin * * *.

is a narrow decision based on the exemption. Accordingly, compliance officers conducting compliance reviews pursuant to the Executive Order shall continue to require adjustments in job or department seniority systems if they perpetuate the effects of past discrimination.

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court
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United States

OCTOBER TERM, 1978
Nos. 78-432, 78-435 and 78-436

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Petitioner,
vs.
BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
vs.
BRIAN F. WEBER,
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UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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BRIEF AMICUS CURIAE FOR THE CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION AND THE CALIFORNIA DIVISION OF FAIR EMPLOYMENT PRACTICES IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE FOR THE CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION AND THE CALIFORNIA DIVISION OF FAIR EMPLOYMENT PRACTICES IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

This brief is filed pursuant to written consent of all parties on behalf of the Division of Fair Employment Practices (the "Division") and the Fair Employment Practice Commission (the "Commission") of the State of California.

The Division and Commission are the agencies responsible for preventing and eliminating employment discrim-

ination in California under the California Fair Employment Practice Act, California Labor Code § 1410 *et seq.* (the "California Act"). The California Act prohibits discrimination on the basis, *inter alia,* of race. This statutory scheme empowers the Division to investigate complaints of discrimination, to attempt to conciliate meritorious complaints and to initiate adversary proceedings before the Commission in those cases in which conciliation efforts prove futile. The Division and Commission also furnish technical guidance to employers who undertake voluntary efforts to eliminate discriminatory practices and conditions.

Whatever success *amici* have achieved in implementing the objectives of the California Act is largely dependent upon voluntary action by employers taken well before *amici* are compelled to invest substantial enforcement resources. In the past, voluntary measures by employers have often precluded the need for formal involvement by *amici* and have contributed to a very high conciliation rate in California. Given *amici's* limited resources and the relative enormity of their task, any significant reduction in these voluntary measures would undermine their capacity to handle those complaints which require full investigation and hearing. *Cf. Allen v. State Board of Elections,* 393 U.S. 544, 556 (1969).

Amici are concerned that affirmance of the decision below would drastically reduce employer incentives to comply voluntarily with employment discrimination laws. The initial impact upon *amici* would be an increase in the number of complaints filed with the Division and a reduction in the number of cases resolved through early conciliation. The ultimate result would be that *all* aspects of

the enforcement process, including conciliation, would suffer—and with it the people whom the process is intended to help.

Plainly, then, *amici* are vitally interested in the outcome of this case. *Amici* also believe that the points they present below are not merely cumulative of the views of the parties or of other *amici,* and that consideration of this brief thus may benefit the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whatever one's view of Title VII and the proper outcome of this controversy, we submit that the decision below is an unhappy one. It establishes principles which will materially increase the amount of litigation in a country which already has too much. It will subject employers to the Hobson's choice of conceding legal vulnerability or accepting an undesirable *status quo* until judicially told to do otherwise. Most important, it cuts against the basic principle of minimizing government involvement and encouraging creative, private solutions to problems of all types. Put another way, it is a decision which strikes a discordant note upon reading and which asks, at the least, for careful reconsideration.

These are not, of course, the only considerations at issue here. Indeed, the claim asserted by Brian Weber—that he has been excluded from Kaiser's craft program because of race—was found sufficiently compelling by the Fifth Circuit to justify the procrustean solution imposed below. We do not intend to demean these concerns. Nor do we suggest that the matter is any less difficult than it is

controversial. We submit, however, that one's initial instinct—that there is simply "something wrong" with the regime created below—is, in the end, correct and should be followed. The purpose of this brief is to suggest, in two respects,[1] why that is so.

First, we submit that the principles applicable to private parties under Title VII differ from those applicable, for example, to governmental conduct under the Constitution.

Second, we suggest that while Title VII is unquestionably concerned with the use of race as a selection criterion in employment, the statute does not, in some instances, prohibit remedial programs for the benefit of racial minorities, who are the special concern of that statute.

I

PRIVATE CONDUCT UNDER TITLE VII IS SUBJECT TO DIFFERENT CONSIDERATIONS THAN APPLY TO GOVERNMENT CONDUCT UNDER THE CONSTITUTION

In *Bakke,*[2] a majority of this Court declared that race might be taken "into account", at least in some fashion, in the admissions decisions of a state professional school. We, of course, concur in that determination. We also sub-

[1]Recognizing our limited position as *amici,* it is not our intention to treat fully the factual and legal issues presented by this case. Given the quality of counsel, plus the numerous other *amicus* briefs anticipated on both sides, that would be, at best, redundant. What we wish to do instead is to offer a perspective from which the important issues presented here might be approached, consistent with the intent of Title VII and the competing interests at stake.

[2]*Regents of the University of California v. Bakke,* 46 U.S.L.W. 4896 (1978).

mit that whatever one's view of that aspect of *Bakke,* this case presents a materially different, and materially stronger, case for the permissible use of racial considerations.

A fundamental distinction between this controversy and a constitutional case such as *Bakke*[3] is that the conduct at issue here is not public, but private, in nature. While Kaiser, like all major corporations (indeed, like all citizens, real and artificial) is subject to a plethora of governmental obligations and restraints, there still are important differences between the private and public sectors which bear on this case.

As *Bakke* exemplifies, the underlying assumption of the Constitution generally, and of the Fourteenth Amendment specifically, is that government should act even-handedly toward all citizens. While that principle obviously does not mean that government can never treat individuals differently, it must, at the least, do so for proper purposes and in a rational manner. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 629, 634-38 (1969); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Moreover, in situations involving so-called "suspect classifications" such as race, the prevailing assumption of the equal protection clause is that government should not, as an ordinary matter, permit such factors

[3]In describing *Bakke* as a "constitutional" case, we recognize that at least four justices found it unnecessary to reach the Fourteenth Amendment question in light of Title VI (42 U.S.C. § 2000d). *Bakke, supra,* 46 U.S.L.W. at 4934 (Stevens, J., concurring in part and dissenting in part). However, even that opinion concedes that the Title VI prohibition was, for all practical purposes, simply a legislative extension of equal protection standards and principles to federally-funded programs. Thus, it is fair to consider *Bakke* a "constitutional" case, at least within the context of the discussion here. As demonstrated in text, however, the same cannot be said of Title VII. *See* pp. 7-10, *infra.*

to be taken into account as a basis for "discriminating" between citizens. While this "neutrality" principle may, of course, yield to compelling circumstances, the operative assumption in this area is exemplified by the observation, albeit hyperbolical, that the Constitution is "colorblind". *See Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Private conduct is a somewhat different matter. Here, the beginning premise is not enforced neutrality but the view that the government's powers are limited ones, and that they exist as restrictions upon, and as exceptions to, the basic right to be free from governmental control. While the extent of current statutory and administrative regulation suggests that these exceptions threaten to engulf the rule, it is nonetheless true that, in the employment area for example, absent explicit governmental intrusion, employment relationships are still a matter of private contract and may be created or terminated for reasons which would be unacceptable if relied upon by government. *See, e.g., Conrad v. Delta Air Lines, Inc.,* 494 F.2d 914, 916 (7th Cir. 1974); *Percival v. General Motors Corp.,* 400 F.Supp. 1322, 1323 (E.D. Mo. 1975); *Marin v. Jacuzzi,* 224 Cal. App. 2d 549, 553 (1964).[4] In fact, unlikely though it might be, were Congress to repeal Title VII (and 42 U.S.C. § 1981) tomorrow, private employers seemingly would again be free to discriminate on grounds of, for example, race or sex.[5] Kaiser would also, unquestionably, be free in such cir-

[4]As recently as 1908, this Court held that an employer's right to discharge *could not be* limited by federal legislation. That extreme rule is, of course, no longer good law. *See, e.g., Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177 (1941).

[5]At least insofar as federal statutory law is concerned.

cumstances to adopt its remedial crafts program. The fact that the "private" sector is free to order its own affairs—except as otherwise expressly directed—means, among other things, that the inquiry here is not even as broad as whether Title VII was intended to *grant* employers the authority to take affirmative action. Rather, the question is whether it *withdrew* that authority.

Quite apart from the public/private distinction discussed above, it is important to keep in mind that this is simply a statutory case. While that point surely is obvious, the emotional intensity on each side of so-called "reverse discrimination" cases, as well as the traditional overlay of "equal protection" considerations in race-related litigation, obscures the narrow issue actually presented. That issue, simply put, is whether Title VII permits—or, more precisely, whether it forbids—the voluntary adoption of race-based remedial programs. Had Congress been explicit on the issue of voluntary affirmative action, this case would never have arisen.

Were this a constitutional case, a set of special concerns, not present here, might bear on the analysis. *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71 Mich. L. Rev. 59, 63 (1972). Unlike the Constitution, which must necessarily be relatively fixed in interpretation and is obviously difficult to alter,[6] statutes are not so limited. If the existing contours of employment discrimination law prove unpopular, or if the need for remedial programs evaporates, it is reasonable to expect that Congress will

[6]*See Bakke, supra,* 46 U.S.L.W. at 4904; *Pollock v. Farmers Loan & Trust Co.,* 157 U.S. 429, 650-51 (1895) (White, J., dissenting).

alter or repeal existing statutes.[7] In fact, as several commentators have pointed out, the ability of the white majority to control the political process is a major bulwark against abuse, and itself is good reason to trust that process to operate satisfactorily in statutory cases. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974).

Consistent with these considerations, this Court has broadly interpreted both the power *and the intent* of Congress with respect to remedial civil rights legislation.[8] Thus, for example, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld § 4(e) of the Voting Rights Act of 1965, which prohibited the enforcement of an English literacy requirement against Puerto Ricans who were thereby deprived of the franchise. The Court interpreted Congress' remedial powers broadly and stated that it was well within Congress' authority to conclude that the need of the Puerto Rican minority for the vote warranted federal intrusion upon the interests served by the literacy requirement. The Court noted that, "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations." 384 U.S. at 653. To similar effect, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court broadly interpreted the intent of Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601

[7]It is at least equally likely that as blacks and other racial minorities achieve better educational and housing opportunities, the need for, and the use of, such special employment programs will likewise diminish. That is a wholly sensible approach to such matters, and one which is preferable to attempting to dismantle judicially-imposed affirmative action programs, with their attendant bureaucracies, court-ordered monitors, reporting requirements, etc.

[8]*See Bakke, supra*, 46 U.S.L.W. at 5905, n. 41.

et seq.) as conferring associational rights upon whites sufficient to permit them to challenge their landlord's discrimination against blacks.

Thus, Congress might have concluded that the history of employment discrimination against blacks *required* private employers to adopt affirmative action programs. The fact that, in weighing the various considerations, Congress opted for less direct intervention into private decision-making scarcely suggests that it thereby intended to prohibit the voluntary use of such programs. To the contrary, Congress *favored* voluntary attempts to alleviate the effects of racial discrimination[9]—presumably because they are the most effective, efficient and least intrusive means of dealing with such problems.

Not only has the Court been deferential to legislative power and intent, but it has also upheld the use of race-conscious solutions to achieve its purpose. Thus, again in the voting area, the Court has specifically approved a race-conscious program "reasonably related to the constitutionally valid statutory mandate of maintaining non-white voting strength." *United Jewish Organizations v. Carey*, 430 U.S. 144, 163 (1977). In that case, the Court sustained a reapportionment plan which employed a racial "quota" (*see* pages 17-18, *infra*) to secure increased representation of blacks in various voting districts for the purpose of fulfilling Congress' intent, in the Voting Rights Act of 1965, "to banish the blight of racial discrimination from voting."

[9]*See, e.g., Bakke, supra*, 46 U.S.L.W. 4921 (Brennan, J., concurring in part and dissenting in part); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 and 55 (1974); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). Remedies in the public school area have been similarly tailored to specific racial objectives and concerns,[10] and the broad discretion of local school officials to implement programs which furthered those goals was, of course, recognized in *Swann*.[11]

II

TITLE VII WAS NOT INTENDED TO FORBID THE USE OF VOLUNTARY REMEDIAL PROGRAMS TO ACHIEVE EQUAL EMPLOYMENT OPPORTUNITY

We come, then, to the question whether Congress intended to preclude the use of race-based affirmative action programs under Title VII. We submit it did not.

It would be wrong, as well as fruitless, to argue that Congress was unconcerned with eliminating the use of race as an explicit selection criterion in employment. As this Court correctly recognized in *McDonald*,[12] that concern properly extends to whites, as well as blacks and other racial minorities.

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[10] *E.g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971).

[11] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities [even] absent a finding of a constitutional violation. . . ."

[12] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

It would be equally disingenuous, however, to suggest that Congress' concern was *limited* to this neutral "nondiscrimination" principle—that is, the view that legislation such as Title VII is concerned with no more nor less than the explicit use of race—and that Title VII was not specially concerned with the employment problems of blacks. Indeed, it is probable that in the absence of historic mistreatment of blacks, Congress would not have perceived a need for Title VII or similar "civil rights" statutes at all. These laws were, in effect, a recognition of the fact that the ordinary interplay of private forces was simply inadequate, in this instance, to undo the patterns of exclusion created by centuries of unequal treatment. As this Court has observed: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was [a] to achieve equality of employment opportunities *and* [b] to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (emphasis added); *see also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).[13]

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[13] In 1971, after studying Title VII's legislative history, the editors of the Harvard Law Review concluded that:

> "Title VII, by outlawing discrimination, was [intended] to improve substantially the employment prospects of blacks. It has been suggested, therefore, that the success of Title VII (and similar state laws) can be measured by reference to statistics indicating the rate of black unemployment and the level of black income. The suggestion is fortified by the legislative history, where one finds repeated recourse to the *central syllogism:* the black community needs to be boosted closer to economic parity with the white community; Title VII will help provide this boost; therefore, Title VII should be passed." *Developments in the Law—Employment Discrimination and*

Recognition of these "dual" concerns—"non-discrimination" plus a special concern for minorities—is supported by the judicial, as well as the legislative, history of Title VII. Initially, most Title VII litigation focused upon instances in which racial animus stood behind the denial of employment benefits to blacks.[14] Indeed, the early view was that a Title VII plaintiff *was required* to demonstrate that the employer's conduct was racially motivated.[15]

This early Title VII history thus reflected the non-discrimination principle; situations involving racial animus were merely the starkest examples of the behavior which that principle prohibits.[16] However, as courts, enforcement agencies and others gained experience under Title VII, it became overwhelmingly clear that confining the application of the statute to a neutral non-discrimination standard would fail to achieve meaningful employment opportunities for blacks. As Chief Justice Burger stated in *Griggs, supra,* 401 U.S. at 431, a broader reading was required in order that Title VII "not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and fox."

Thus, as it became painfully obvious that our nation's race problems were traceable to a complex of conditions

Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1113-14 (1971).

[14]*E.g., Clark v. American Marine Corp.,* 304 F.Supp. 603, 607 (E.D. La. 1969); *Quarles v. Philip Morris, Inc.,* 279 F.Supp. 505, 509 (E.D. Va. 1968); and *United States v. H.K. Porter Co.,* 296 F.Supp. 40, 107 (N.D. Ala. 1968).

[15]*See, e.g.,* M. Sovern, *Legal Restraints on Racial Discrimination in Employment* 15, 70-73 (1966).

[16]The so-called "disparate treatment" Title VII cases (*e.g., McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)), as opposed to the "disparate impact" cases, are another example.

and to the actions and inactions of numerous individuals and institutions, it likewise became clear that Title VII would ring hollow if such persons and institutions could, Alphonse-Gaston-like, each place the blame on others and not take steps to deal with those problems. In short, to require a minority Title VII plaintiff to pin his deprivation of employment benefits squarely on the misbehavior of his employer would have materially frustrated Congressional purpose.

Concerns such as these lay behind the line of cases begun, and perhaps most clearly exemplified in this Court, by *Griggs.*[17] These cases imported, into Title VII law, a number of mechanisms which nudged open the judicial door so that the statute might achieve its special objective. These mechanisms included, among others, "impact analysis" and related statistical presumptions, rather than proof of intent (*e.g., Griggs, supra,* 401 U.S. at 430; *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974)),[18] and liberal interpretations of Title VII's pro-

[17]For example, the Court noted in *Griggs* that "[b]ecause they are Negroes, petitioners have long received inferior education in segregated schools . . . [;] Congress has . . . required that the posture and condition of the job-seeker be taken into account." 401 U.S. at 430-31; *see also McDonnell Douglas, supra,* 411 U.S. at 806.

[18]The function served by devices such as impact analysis becomes clear when one recognizes that they would not merely be unnecessary, but *invidious and unacceptable,* in the absence of historical discrimination. In such circumstances, anti-discrimination legislation would not seek to achieve employment ratios of blacks or whites which parallel their proportions in the population as a whole. For whatever reasons, members of different groups may, on the average, aspire to different jobs to different degrees. *See generally DeFunis v. Odegaard,* 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). Were it not for a history which gives us compelling reasons to be suspicious of employment statistics sharply skewed against minorities, statistical disparities would cause no special concern.

cedural requirements and mechanisms. *E.g., Oatis v. Crown Zellerbach Corporation,* 398 F.2d 496 (5th Cir. 1968). The function of these devices, endorsed and elaborated in cases as recent as *Hazelwood School District v. United States,* 433 U.S. 299 (1977), and *T.I.M.E.-D.C. v. United States,* 431 U.S. 324 (1977), was to minimize an employer's ability to perpetuate, even in good faith, the effects of historical and contemporary discrimination by others.[19]

To be sure, devices such as impact analysis did not relieve minority plaintiffs from having to establish that the defendant had unlawfully discriminated. They did, however, substantially broaden the meaning of "unlawful discrimination" in order that Title VII might at least begin to reduce the racial disparities which so concerned Congress.[20] *Compare Green v. County School Board,* 391 U.S. 430, 439 (1968) (the goal of remedial programs is that they should be made to "work, and . . . work *now*").

The line of cases represented by *Griggs* and its progeny stand for the principle that, in order to achieve its remedial purpose, Title VII extends to *something more* than the situation in which an employer has violated the neutral non-discrimination principle. Today, the Court faces the "flip side" of this issue. Whereas *Griggs* extended Title VII beyond mere non-discrimination, the Court now must decide whether Title VII, for the same reasons, prescribes *something less* than non-discrimination and permits an

[19]By forcing employers to restructure employment tests and take other steps, cases such as *Griggs* really require employers to remedy discrimination by others. Absent the historical backdrop against which Title VII rests, certainly nothing in that legislation would have required employers to improve the validity of their testing techniques.

[20]For an excellent discussion of the evolution of Title VII and litigation thereunder, see Blumrosen, *supra,* at page 7.

employer, in some instances, to adopt a race-conscious affirmative action program.[21]

We submit, of course, that the answer is "yes". As Judge Wisdom argued persuasively below (563 F.2d at 230), the Fifth Circuit's decision places employers in an untenable position.[22] That this state of affairs is unfortunate for employers we trust will be aggressively argued by Kaiser.

[21]Just how much less the Court need not decide today. Looking ahead, however, we note the United States' proposal that employers be permitted to adopt programs similar to Kaiser's when they have reasonable grounds for believing that they may have Title VII exposure. Such a formula would fall easily within the confines of existing law as an application of the "business necessity" defense. *See generally Griggs, supra.* That formula might be broadened to include situations in which the employer's conduct which preceded Title VII's 1965 effective date would have violated Title VII had it occurred later. That Congress did not give retrospective effect to Title VII hardly demonstrates that Congress intended to prohibit voluntary remedial efforts intended to offset the effects of such conduct. *Cf. Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). To the contrary, we trust that Congress would be delighted with such efforts. Still another formulation would permit employers to adopt Kaiser-type programs when some related party, for example a union, may have violated Title VII or other civil rights legislation. Finally, the Court might consider an even broader approach, as suggested by Judge Wisdom below (563 F.2d at 234), which takes into account societal discrimination generally—perhaps limited by a requirement that there be a substantial disparity between the racial profile of the employer's workforce and an appropriate "yardstick" population. In any event, Kaiser's program satisfies even the narrowest standard suggested here.

[22]Indeed, the employer's plight under the Fifth Circuit's regime may be far worse, and the likelihood that the employer would voluntarily adopt an affirmative action program far less, than Judge Wisdom suggests. As his dissent points out, if the Fifth Circuit's position prevails, an employer must expressly or implicity admit to prior unlawful acts before it can voluntarily adopt such a program. In addition, however, the affirmative action programs which the opinion below theoretically permits would be so narrowly remedial that they could not benefit minority group members other than the actual victims of the defendant's unlawful acts. Consequently, in structuring a voluntary affirmative action program, an employer would be required to admit prior wrongdoing *and* identify prospective plaintiffs.

More important for present purposes, however, is that tightening the vise around employers will virtually halt voluntary efforts to reduce the racial disparities which so concerned Congress in 1964.[23] *See* page 11 and note 13, *supra.* Save for those few employers who are convinced they will be successfully sued by minority plaintiffs in any event, employers will implement voluntary programs only if directed to do so by courts. Since courts simply lack the resources to adjudicate any significant number of discrimination cases, let alone to structure and administer complex affirmative action programs, the effect of the decision below will necessarily be to reduce the scope and effectiveness of Title VII across the board. We submit, therefore, that the reasons which justified departure from the non-discrimination principle in the *Griggs* line of cases justify such departure again today.

In urging reversal, we do not overlook the detriment incurred by individuals such as plaintiff Weber. That is, admittedly, an undesirable consequence. It is, however, a largely *unavoidable*[24] result of permitting Title VII to achieve the ends which Congress contemplated. More significantly, it is a judgment which was within the competence

[23]And again in 1972 when it amended Title VII. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 723, 751-57 (1972).

[24]The detriment incurred by plaintiff is the result of the fact that in order to provide special opportunities for blacks, it was necessary to take some away from whites. That was not, of course, Kaiser's desire, nor its "intent", as that last concept was used in such cases as *Washington v. Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). *United Jewish Organizations* demonstrates that the intent standard developed in those decisions should be applied in cases involving the explicit use of race for remedial purposes (*id.,* 430 U.S. at 169-70; Brennan, J., concurring), not merely in cases involving "neutral" actions which have racially disparate effects.

of Congress to make and the Courts to enforce. *See* pp. 7-10, *supra.*

It must also be remembered that the detriment complained of here is not unfamiliar in Title VII and other civil rights litigation. For example, in *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976), this Court approved remedial relief which without question deprived whites of employment benefits. True, *Franks* involved an instance of prior unlawful discrimination by the employer. However, the price paid by the white employees of the Bowman Transportation Co. as a result of the remedial relief endorsed in that case was identical to the price they would have paid had the company voluntarily implemented an affirmative action program in the absence of prior illegality. Indeed, if the law is to draw any distinction between race-conscious conduct which is and is not intended to compensate for an employer's prior unlawful acts, the former presents a far more appealing case for a "Weber-type" plaintiff than does the case at bar. For in that case, the plaintiff's injury *is a result of* defendant's unlawful conduct and not, for example, the defendant's desire to achieve racial harmony. *See also Teamsters v. United States,* 431 U.S. 324, 426 (1977).

Similarly, in both *United Jewish Organizations* and *Bakke,* a majority of this Court approved the use of racial considerations in circumstances inexorably involving white "victims". In the former case, plaintiffs were unquestionably deprived of their prior voting effectiveness as a consequence of Congress' desire to improve the voting leverage of blacks. It is true that the unsuccessful plaintiffs in *United Jewish Organizations* were not denied the franchise, but that is no more an answer than it was to the

gerrymandered blacks who successfully challenged race-based redistricting plans which effectively nullified the impact of their votes. *See, e.g., Gomillion v. Lightfoot,* 364 U.S. 339 (1960). And again in *Bakke,* if the proposition that race may be considered in medical school admissions decisions really has meaning, then under some circumstances individuals may be excluded from such programs on account of their race.

It comes to this: an interpretation of Title VII which fails to take account of its dual purposes would not merely be untrue to its language,[25] but would frustrate a principal objective of the statute. Perhaps in a different historic setting, a law which simply forbade the use of racial considerations would be sufficient to assure equal opportunity. However, we are not yet at that point. It thus would be unfortunate, and inappropriate, for the Court to hold now that Congress intended to forbid voluntary affirmative action programs.[26]

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[25]As others will doubtless discuss more fully, the carefully worded provision of § 703(j) of Title VII (42 U.S.C. § 2000e-2(j)), which forbids the *imposition* of affirmative action, must be read as at least implicit acceptance of voluntary remedial programs. That conclusion as to Congressional intent is reinforced by the unsuccessful legislative efforts to remove such authority by amendment, and to reverse the holdings of lower court decisions which had approved race-conscious programs. *See, e.g.,* 118 Cong. Rec. 1664-65 and 1676 (1972); and Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 1844 (1972).

[26]The result urged here leaves intact the non-discrimination analysis of decisions such as *McDonald, supra.* That case involved simply an instance of gratuitous and purposeless racial discrimination. To endorse defendant's conduct there would obviously have been inconsistent with the non-discrimination principle, and would not have furthered Title VII's additional goal of improving minority job opportunities. Moreover, reversal of the Fifth Circuit's decision here would, needless to say, have no impact upon the clearly unlawful situation in which a non-minority person is the intended victim of racial animus.

CONCLUSION

For the foregoing reasons, we respectfully urge that the decision below be reversed.

Dated: January 22, 1979.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

BRIEF OF *AMICI CURIAE*

The National Puerto Rican Coalition and The Puerto Rican Forum

---

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BRIEF OF *AMICI CURIAE*

The National Puerto Rican Coalition and The Puerto Rican Forum

---

Interest of the *Amici*[1]

The National Puerto Rican Coalition, a non-profit corporation based in New York City, is an alliance of over 40 prominent Puerto Rican leaders. They represent organiza-

---

[1] Letters of the petitioners and respondent giving their consent to the filing of this brief have been filed with the Clerk of this Court.

tions throughout the country, both private and governmental, which have worked separately and together to improve the social and economic conditions of Hispanic persons. Among the Coalition's major concerns are economic development, the fostering of equal opportunity and the encouragement of affirmative action programs for Puerto Ricans. The Puerto Rican Forum is a non-profit organization, founded in 1957 and located in New York City, which concentrates its work in employment and job training. Its main goal is the advancement of the Hispanic community in the United States. The organization has a major interest in enhancing and increasing employment opportunities for Puerto Ricans and other Hispanics. Both of these organizations have worked to foster equal employment opportunity for Puerto Ricans through a variety of means, including affirmative action programs.

This litigation places before this Court the question of the legality of an affirmative action program to integrate minorities into certain craft positions at a large industrial plant. The Court's decision is likely to affect the validity of other programs designed to bring about an integrated workforce in which all Americans can participate on a basis of equality and without discrimination on account of racial or ethnic status.

Hispanic persons have an important interest in these issues. They constitute the second largest minority in this country. As of 1977, approximately one out of every twenty Americans was of Spanish descent,[2] including nearly 1.7 million persons of Puerto Rican birth or parentage resid-

[2] United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 317, "Persons of Spanish Origin in the United States: March 1977" at 3 (December 1977).

ing in the continental United States.[3] The incidence of poverty and unemployment among this Puerto Rican population is more severe than that among virtually any other ethnic group in the United States.[4] In 1977, Puerto Ricans experienced an unemployment rate of 14.6 percent, as compared with 6.2 percent for white Americans.[5] For male Puerto Rican teenagers in the preceding year, the unemployment rate was a staggering 55.2 percent.[6]

Where Puerto Ricans are employed, it is often in the lowest-skilled and lowest-paying jobs. As of March 1976, more than 30 percent of employed Puerto Rican workers were operatives, including factory workers, dressmakers and seamstresses, while only 15.1 percent of the total employed population held jobs in this low-paying category. The second largest job category for Puerto Ricans was low-paying service employment, such as restaurant and cus-

[3] United States Commission on Civil Rights, *Puerto Ricans in the Continental United States: An Uncertain Future* at 5 (1976).

[4] *Id.*

[5] United States Commission on Civil Rights, *Improving Hispanic Unemployment Data: The Department of Labor's Continuing Obligation* at 4, 8 (1978).

[6] United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* at 32 (1978). These figures considerably understate the dimensions of the Puerto Rican unemployment problem, because they are based on the Department of Labor definition of unemployment based on the percentage of the labor force that is jobless, with the labor force defined as those actively seeking employment. This definition does not take account of those who have grown so discouraged about the prospects for obtaining employment that they have stopped looking for work. While it is difficult to ascertain the size of this group with complete precision, the federal government estimated in 1966 that if it were included in calculating the unemployment rate, it would have produced a figure of 33.1% as the real unemployment rate of Puerto Ricans in the slum areas of New York City. United States Commission on Civil Rights, *Puerto Ricans in the United States: An Uncertain Future* at 51-52 (1976).

todial work. 21.9 percent of all employed Puerto Ricans held such jobs, as compared with only 13.9 percent of the total employed population. Puerto Ricans, on the other hand, remain significantly under-represented in better-paying job categories, including craft positions. In 1976, only 10.5 percent of employed Puerto Ricans held jobs in craft or kindred fields.[7]

Because of this extreme underutilization of Puerto Ricans in the American workforce, *amici* have sought to maintain and expand both governmental programs and voluntary programs instituted through collective bargaining by employers and unions to improve the employment status of Puerto Rican citizens. *Amici* file this brief to show that the affirmative action program at issue in this case violates neither Title VII of the Civil Rights Act of 1964 nor the Constitution.

ARGUMENT

I.

Petitioners' affirmative action plan was properly instituted under Title VII in order to avoid Title VII liability.

In 1974 petitioners Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA") adopted a new system for choosing entrants to on-the-job training for craft positions exclusively from within the Kaiser Gramercy plant. Title VII prohibits the use of criteria for promotion, job selection or admission to training programs that (1) are not job-related and (2) have a disparate negative impact on any protected group. Had it gone no further, the Kaiser-USWA closed training program would have had such a disparate negative impact on members of racial minorities, because of the relatively low proportion of minority persons employed at the Gramercy plant as compared to their percentage in the surounding work force. No job performance justification for this discriminatory result could reasonably have been expected to be shown. Petitioners' institution of such a system of selection exclusively from within would therefore have violated Title VII, unless petitioners simultaneously took measures to eliminate its disparate racial impact. By utilizing affirmative action in the form of racially conscious selection criteria, petitioners eliminated the disparate impact on minorities and avoided violating Title VII. This use of racially conscious selection criteria was therefore wholly consistent with, and indeed required by, Title VII.

[7] United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 310, "Persons of Spanish Origin in the United States: March 1976" at 27 (July 1977).

A. Petitioner's Adoption of a Closed System for Selecting Applicants for On-the-Job Craft Training Would Have Violated Title VII, in the Absence of an Affirmative Action Component.

This Court's decisions have established the principle that an employer's or union's use of selection criteria that are racially neutral on their face, but that in application have a disproportionate negative impact upon a protected group and are not substantially related to the requirements of the job in question, violates Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* holds that Title VII

> . . . proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 431.

Petitioners' closed training program, if unaccompanied by a compensating affirmative action component, would be just such a practice. Prior to 1974, Kaiser had chosen entrants into on-the-job training for craft positions on the basis of prior craft experience (A. 71-72, 89-90).[8] As a result of the use of this criterion, virtually all of Kaiser's craft employees at the Gramercy plant were hired off the street, rather than from among Kaiser's existing employees at the plant (A. 121). In 1974, this criterion was replaced by a system of selecting entrants for on-the-job training exclusively from among the existing work force at the Gramercy plant. The new system jettisoned the experience requirement and substituted for it a requirement that the applicant for on-the-job training be a present employee at the Gramercy plant.

The new requirement of current employment, standing by itself, would clearly have had a disparate impact on members of racial minorities. Minority members comprised only 14.8 percent of the Kaiser Gramercy plant's hourly employees at the end of 1974 (A. 94), far below the 39 percent population in the available local labor force (A. 95). Whatever the reason for this disparity, which itself makes out a prima facie case for discrimination, *see Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), it is evident that a job training selection system restricting eligibility to the existing Gramercy work force in 1974 would have operated disproportionately to

[8] References to the Appendix appear as "A".

exclude minority members from such training, because of their relative underrepresentation among the plant's employees. The result of the new closed training program, given its lack of "manifest relationship to the employment in question," *Griggs* v. *Duke Power Co.*, 401 U.S. at 432, would have been a violation of Title VII, which would in turn have been remediable by affirmative action. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).[9]

[9] This result would not have been affected by the fact that the new closed training program system used seniority, which enjoys a specially protected status under Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), as a further means of selection from among the eligible group of existing employees. It is in the disproportionate impact of the closed system of selection itself on an employee group in which minority members are underrepresented that the Title VII violation inheres and not in the use of any additional winnowing device, be it seniority or a lottery, to select from among this already imbalanced group.

There is, moreover, a serious question as to whether the use of a seniority system as a further selection device on the facts presented by this case would constitute a "bona fide" seniority system within the meaning of Section 703(h), as construed by this Court's decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Section 703(h) was intended by Congress to insulate *existing*, otherwise *bona fide*, seniority systems from attack for merely perpetuating the effects of racial discrimination prior to, *Franks* v. *Bowman Transportation Co.*, or subsequent to, *International Brotherhood of Teamsters* v. *United States*, the effective date of Title VII. These cases cannot properly be extended to the situation where an employer or union chooses to use a seniority system *for the first time* as a device for allocating an employment benefit previously allocated according to other criteria, when the effect of such choice is to cause a disproportionate impact on a racial or ethnic minority group. The rationale of Section 703(h) is the protection of legitimate expectations of benefit engendered by an existing seniority system. No such expectations can exist when a benefit, as here, has never previously been conferred on a seniority basis.

B. Petitioners Could, Consistent With the Purposes of Title VII, Voluntarily Remedy the Title VII Violation That Their Closed Training Program Would Otherwise Have Created by Adopting an Affirmative Action Component to That Program.

1. *A Racially or Ethnically Conscious Selection Criterion Is a Proper Remedy for Title VII Violations.*

In *Franks* v. *Bowman Transportation Co., supra,* this Court held that affirmative action, including relief that affects the seniority rights of employees not affected by discrimination, may appropriately be required under Title VII in order to remedy fully the effects of unlawful employment discrimination on grounds of race. Such relief is available to all members of an affected class when the class as a whole has suffered from the discrimination at issue, 424 U.S. at 772-73, and may not be denied simply because the economic interests of other employees embodied in an existing seniority system are thereby affected. 424 U.S. at 744-75.[10] Thus, for example, if all minority employees in a plant had been victimized by an unlawful system of selection for job training based on racial discrimination, it would be appropriate to order as a remedy that all future job training vacancies be held open for minority employees until they regained the rightful status that they would have enjoyed but for the discrimination they suffered. *Cf.* 424 U.S. at 767-68.

[10] Although the Court has not expressly approved use of a racial "quota" as a form of affirmative action relief in an employment case, the Court has frequently approved of numerical remedies in school desegregation cases. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The use of mathematical ratios for remedial purposes has also been approved in connection with reapportionment plans under §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144 (1977).

In the instant case, Kaiser and USWA chose a fair and reasonable way of eliminating the disparate racial impact implicit in the decision to confine the training program to current employees. On its face the program provides for the selection of minorities in rough proportion to their representation in the available workforce. As applied to respondent, the program is equally non-discriminatory. With half of training program positions reserved for minority group members, respondent Weber is indeed in a better position than he would be in if such positions were assigned by lottery to applicants from both within and outside the plant. He has the benefit of a seniority preference (Weber was employed in 1968, A. 55) that he would not have had under an open training program. *His* complaint is therefore no more than the untenable contention that he is entitled to the benefit of the disparate racial impact of the selection criteria employed.[11]

[11] The disapproval of racial quotas voiced in *Regents of the University of California* v. *Bakke,* 46 U.S.L.W. 4896 (June 28, 1978) does not require affirmance in this case. The plurality opinion in *Bakke* distinguished cases where findings of unlawful discrimination had been made, and by implication approved court-ordered or administratively required quota remedies in such cases. *See e.g. Carter* v. *Gallagher,* 452 F.2d 327 (8th Cir. 1971) (*en banc*), *cert. denied,* 406 U.S. 950 (1972; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974). Since *amici* contend that petitioners' adoption of a closed training program would have constituted unlawful discrimination in violation of Title VII if it had not simultaneously been compensated for by affirmative action, approval of that plan is in no way inconsistent with anything said in *Bakke.*

2. *Petitioners' Vountary Adoption of a Quota Remedy Fulfilled the Purposes of Title VII by Avoiding the Violation of Title VII That Their Closed Training Program Would Otherwise Have Caused.*

If *amici* are correct that petitioners' use without affirmative action of a closed system of entry to on-the-job training would have violated Title VII because of its racially disproportionate impact, it follows that voluntary action by petitioners to remedy this situation was necessary to comply with, and promote the purposes of, Title VII. Congress emphasized, and this Court has recognized, the important place which voluntary compliance and self-evaluation by employees and unions occupy under the Title VII statutory scheme. *See, Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). *Cf., Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 246 (1965) ("The [1964 Civil Rights Act as finally adopted was most comprehensive, undertaking to prevent through voluntary and peaceful settlement discrimination in . . . employment"). As the court below acknowledged, voluntary compliance in eliminating unfair employment practices is preferable to court action, and encouraging settlement without litigation is the central theme of Title VII. 563 F.2d at 223. To force an employer or union to perpetuate practices which they themselves perceive as violating Title VII and to prohibit affirmative action remedies until suit is filed and the lengthy and costly process of litigation is concluded would run wholly counter to this basic goal of Congress. This Court should not mandate a result so clearly contrary to expressed legislative policy.

II.

Petitioners' affirmative action plan was properly instituted in order to comply with Executive Order 11246.

Executive Order 11246 requires federal contractors to take affirmative action to cure underutilization of minority group members in their work forces. The Executive Order, and the affirmative action which it mandates, do not depend for their applicability on a judicial or quasi-judicial finding of past intentional discrimination by a specific covered employer; rather, they implement a general policy determination that contractors and subcontractors with the United States should strive to achieve a workforce integrated in fact. The Executive Order is a valid response to this determination, which conflicts with neither Title VII nor the constitutional limits on the power of the federal government.

A. Executive Order 11246's Requirement for Affirmative Action by Government Contractors Is Not Dependent Upon a Finding of Past Discrimination by Employers Subject to the Order.

Unlike Title VII, which refers to affirmative action only in its remedial provisions, Section 706(g), 42 U.S.C. § 2000e-5(g), Executive Order 11246's clear language mandates affirmative action as a substantive obligation upon all government contractors within its purview. Section 202 of the Order, 3 C.F.R. 339 (1964-65 compilation), requires all government contractors to agree that

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin . . . . *The contractor will take affirmative action* to ensure that appli-

> cants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. *Such action shall include,* but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and *selection for job training,* including apprenticeship. (emphasis supplied)

If the Executive Order were intended to proscribe only intentional discrimination, it would not have needed to continue beyond its first sentence, which prohibits employment discrimination in terms virtually identical to those of Title VII. *See* Section 703(a), 42 U.S.C. § 2000e-2(a). But Section 202 of the Order does continue, and imposes an additional affirmative action obligation upon employers within its scope. This additional obligation is the obligation to take steps to remedy the underutilization of minorities and to bring about integration in fact. 41 C.F.R. §§ 60-1.40, 60-2.2(a), 60-2.10 (1977).

Because Executive Order 11246 expressly provides for affirmative action in the first instance as a substantive obligation of all government contractors, it should not be read as requiring a prior finding of specific past discrimination by a given employer as a necessary condition to such employer's affirmative action obligation. Such a reading would be contrary to both the language and structure of the Executive Order and to its interpretation by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCC"), whose regulations, 41 C.F.R. § 60-1.1 *et seq.* (1978), require all employers covered by the Order to prepare goals and time-tables for increasing the

utilization of minority personnel in the higher-paying job categories from which they have historically been excluded.[12]

Faced with the disproportion of minority members in craft positions at the Gramercy plant relative to the surrounding labor force, petitioners were thus required by Executive Order 11246 to institute an affirmative action program for increasing minority representation in these positions. Under the Executive Order program, petitioners were not first required to concede that they had been guilty of past intentional discrimination, since their affirmative action obligation existed independent of any finding of past discrimination. To require a concession of this nature would tend to act as a disincentive to the instituting of affirmative action programs, because such a concession might leave employers and unions open to back-pay liability under Title VII. Moreover, such a requirement would run counter to the emphasis that Executive Order 11246, like Title VII, puts upon voluntary compliance efforts. *See* 41 C.F.R. § 60-2.2(c)(3) (" . . . every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies . . . " in employer's affirmative action plans).

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[12] These regulations are entitled to the more than ordinary deference due to an administrative agency's interpretation of an Executive Order which it is charged with administering. *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965). They include a specific finding by the OFCC that "[b]ased upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following . . . designations," a list which includes "craftsmen (skilled)." 41 C.F.R. §60-2.11 (1978).

B. Executive Order 11246, Insofar as It Requires Affirmative Action Affecting the Economic Interests of Non-Minority Employees, Is Consistent With Both Title VII and the Constitution.

1. Executive Order 11246 Is Consistent With Title VII.

The starting point for any discussion of potential conflicts between executive action and a congressionally enacted statute must be the opinions of the members of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Justice Jackson there set forth three categories for analyzing challenges to the validity of action taken by the President. 343 U.S. at 635-38. The first involves situations in which the President acts pursuant to an express or implied authorization of Congress; as to such actions, his authority is at a maximum. The second category involves situations in which the President acts in the absence of either a congressional grant or denial of authority; as to these actions, judicial evaluation must proceed on a case-by-case basis, turning on the particular facts of each exercise of executive authority. Finally, the third category involves those situations in which the President takes measures incompatible with the express or implied will of Congress; as to such measures, the claims of the executive must be scrutinized with caution in order to prevent an unconstitutional derogation of congressional power.

Application of these principles to the facts presented in this case yields the conclusion that Executive Order 11246 has been impliedly endorsed by Congress and implicitly exempted from any constraints on affirmative action that may be embodied in Title VII. It therefore falls within the first category set forth in Justice Jackson's schema, and must be deemed to be "supported by the strongest of presumptions and the widest latitude of judicial interpretation," making "the burden of persuasion . . . rest heavily upon any who might attack it". 343 U.S. at 637.

As Judge Wisdom pointed out in dissent below, 563 F.2d at 237-37, numerous actions taken and statements made during Congress' consideration of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, amending Title VII, evidenced congressional exemption of Executive Order 11246 from what was perceived as a more limited scope for affirmative action under Title VII. In supporting an amendment designed to reject an earlier proposal to transfer the enforcement of the Executive Order from the OFCC to the Equal Employment Opportunity Commission, Senator Saxbe stated:

> "It has been the 'goals and timetables' approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required." 118 Cong. Rec. 1385 (1972).

Senator Williams, although opposing Senator Saxbe's amendment for other reasons, evinced the same understanding of the distinctive scope of Executive Order 11246, as compared with that of Title VII.

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort *regardless of the past history of the employer* to upgrade and improve its minority work force. 118 Cong. Rec. 1389 (1972) (emphasis supplied)

Both proponents and opponents of this amendment (which the Senate passed) thus demonstrated that they approved of imposing a primary obligation upon government contractors under Executive Order 11246 to take affirmative action to upgrade and more fully utilize minority employees.

Similar intent to preserve affirmative action under Executive Order 11246 is shown by the Senate's rejection of an amendment to Section 703(j) of Title VII, offered by Senator Ervin, which would have extended that section to read:

> "Nothing contained in this title *or in Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . " 118 Cong. Rec. 4917-4918 (1972). (emphasis supplied.)

By rejecting this attempt to prevent Executive Order 11246 from requiring "preferential treatment" for any individual, Congress by plain implication approved the continued requirement of affirmative action in appropriate cases under the Executive Order. *Compare* statement of Sen. Ervin, 118 Cong. Rec. 1663-64, with statement of Sen. Javits, 118 Cong. Rec. 1664-65.

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1884 (1972).

Since such "present case law" included the decision in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971), which upheld the imposition of quotas for craft hiring under Executive Order 11246 pursuant to the so-called "Philadelphia Plan," it is evident that Congress approved the decision in that case as a correct statement of the law. *Amici* submit that Congress' intention is clear that affirmative action should continue to be required of government contractors and subcontractors under Executive Order 11246.

2. *Executive Order 11246 Is Consistent With Constitutional Limitations on Federal Power.*

By its terms, the applicability of Executive Order 11246 does not hinge on proving prior specific acts of intentional discrimination by a given employer. The legislative history discussed above offers no suggestion that Congress had a different understanding of what the Order means. There can be no question of the general power of the federal government to demand that those who contract with it comply with congressionally articulated policy, *see Perkins*

v. *Lukens Steel Co.,* 310 U.S. 113, 127 (1940), or of Congress' power to enact legislation concerning discrimination in employment affecting commerce, *see National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), and to authorize presidential action consistent with such legislation. The inquiry then becomes, does anything in the Fifth Amendment to the Constitution nonetheless prohibit the exercise of federal power to require affirmative action to cure underutilization of minority workers in the absence of a concession or adjudication of intentional discrimination?

Although the Fifth Amendment does not contain an equal protection clause like that of the Fourteenth Amendment, the federal government is nevertheless required to avoid utilization of irrational or invidious classifications that violate the Fifth Amendment's Due Process Clause. The similarities and differences between the equal protection guaranteed by the Due Process Clause of the Fifth Amendment on the part of the federal government and the "equal protection of the laws" required of state governments by the Fourteenth Amendment were first described by this Court in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954):

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American idea of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two

> are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. 347 U.S. at 499.

The Court has recently had occasion in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976) to discuss further the constitutional differences between the two concepts, as well as their similarities, in considering a challenge by resident aliens to federal regulations restricting civil service employment to United States citizens.

> Although both Amendments require the same type of analysis, see *Buckley* v. *Valeo,* 424 U.S. 1, 93, the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but *more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.* On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause. 426 U.S. at 100. (emphasis supplied.)

The teaching of *Hampton* v. *Mow Sun Wong* is that the federal government may utilize classifications that would be impermissible for a state in service of overriding national interests and policies that are entrusted peculiarly to its care. *See also Examining Board* v. *Flores de Otero,* 426 U.S. 572, 608 (1976) (Rehnquist, J. dissenting in part). The basic equal protection analysis, of course, remains the same, *Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976), and the

Court must closely scrutinize any federal classification involving racial criteria. *See Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954).

It is in light of these principles that the Court should analyze any asserted conflict between the action of the federal government under Executive Order 11246, as approved and sanctioned by Congress, and the Due Process Clause of the Fifth Amendment. Affirmative action under the Executive Order, as in the instant case, may require the use of racially conscious selection criteria designed to eliminate the underutilization of minorities over a fixed period of time. Analysis of the affirmative action plan in this case, however, demonstrates that the use of quotas here is not arbitrary but rather is a necessary measure to cure a substantial underutilization of minority workers and to achieve integration in fact. The plan is based on criteria laid down by the OFCC, the administrative agency responsible for enforcing Executive Order 11246, and reflects that agency's experience with the problems of employment discrimination. *See* 41 C.F.R.§ 60-2.11 (1978). Such affirmative action programs do not displace any nonminority worker from his job, nor do they require the selection of those less qualified at the expense of the more qualified.[13]

[13] This factor, together with the absence of state action which invokes the Equal Protection Clause of the Fourteenth Amendment, significantly distinguishes the instant case from *Regents of the University of California* v. *Bakke,* 46 U.S.L.W. 4896 (June 28, 1978), where the record demonstrated a selection of medical school applicants under the University's affirmative action program who were less qualified than the respondent Bakke in terms of the University's own selection criteria. Here, by contrast, selection in the absence of affirmative action would have been solely on the basis of plant seniority, a qualification which is not job-related and which replaced the previous criterion of prior experience for admission to craft training at Kaiser's Gramercy plant.

This Court has been faced before with situations in which action on a broad scale was taken by the federal government to prevent and to remove the effects of discrimination. In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Court upheld as a proper exercise of congressional power Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(e), which prevented the enforcement of a New York statute having a discriminatory effect upon Spanish-speaking persons (largely Puerto Ricans) despite the absence of any finding that the constitutional rights of these people had been violated. Although *Katzenbach* v. *Morgan* involved Congress' powers under Section 5 of the Fourteenth Amendment, its clear implication is that when the federal government acts in a principled way to foster the constitutional goal of equal opportunity, it may require remedial measures which do not depend for their application on an official declaration of the existence of prior intentional discrimination. Here, the federal government has acted through Executive Order 11246, and Congress has approved its action as consistent with the provisions of Title VII. Unlike the situation in *Regents of the University of California* v. *Bakke, supra,* a responsible governmental agency, with the approval of Congress, has identified the existence of discrimination or its aftereffects, and provided an appropriate remedy. The due process mandate of the Fifth Amendment, proscribing discrimination that is "so unjustifiable as to be violative of due process," *Bolling* v. *Sharpe,* 387 U.S. at 499, has not been transgressed. The validity of petitioner's action taken pursuant to Executive Order 11246 should therefore be upheld by this Court.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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January 25, 1979

Supreme Court, U. S.
FILED
JAN 25 1979
JAMES R. BRODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR TRADE UNION ACTION AND DEMOCRACY

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR TRADE UNION ACTION AND DEMOCRACY

INTEREST OF AMICUS CURIAE[1]

The National Coordinating Committee for Trade Union Action and Democracy is an organization which was formed to provide a structure within which the various elements of the growing rank and file labor movement could join together in support of their common interests. Throughout the life of the Committee, it has stressed the importance of providing women and minority people with the jobs and opportunities that they have been denied due to discrimination and its effects. This is based upon an understanding that the rank and file members of the labor movement will only achieve their legitimate goals in life if no section of that movement is deprived of the right to strive for those goals. In furtherance of this understanding, the Committee has consistently, since its formation in 1970, encouraged and supported the use of affirmative action plans to correct the effects of past discrimination in the work places of this country.

[1] This brief is filed with the consent of the parties. The letters of consent are being filed concurrently with this brief.

ARGUMENT

I.

THIS CASE WAS IMPROPERLY BEFORE THE DISTRICT COURT DUE TO THE ABSENCE OF INDISPENSABLE PARTIES WHO, ALONE, HAD AN INTEREST IN PROVING PAST DISCRIMINATION AS A BASIS FOR THE AFFIRMATIVE ACTION PLAN CONTAINED IN THE COLLECTIVE BARGAINING AGREEMENT.

At the trial level, where the factual record in this case was made, the only parties to this case were Weber, acting for himself and on behalf of the allegedly discriminated-against white employees, and Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser") and the United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), the signers of the collective bargaining agreement which included the affirmative action plan in question. None of these parties had any interest in proving past discrimination against the present or potential black employees in this case. Weber was not interested because it would hurt his case, and neither Kaiser nor USWA were interested because to admit past discrimination would open themselves to a likely barrage of cases relying on that admitted past discrimination. Thus the issue of whether or not there existed any illegal past discrimination at Kaiser's Gramercy, Louisiana plant, was without an antagonist.

The dissenting opinion of Judge Wisdom of the Court of Appeals quite forcefully noticed this fact:

> The reason for the lack of analysis [of past discrimination] is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial

> below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 231 (5th Cir., 1977).

Likewise, even the majority opinion for the Court of Appeals admitted that the issue of whether there was past discrimination by Kaiser or USWA was not in dispute.

> The district court found, and appellants all but concede, that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant. *Weber, supra* at 224 [footnote omitted].

The black employees at the Gramercy plant, the major beneficiaries of the affirmative action plan which is attacked here, were without any representative when this case was before the district court. They are the indispensable parties who are missing from this case, and the only parties who are, or were, interested in proving past discrimination against them because of their race.

Under Article III, Section 2 of the United States Constitution, the judicial power extends only to "cases" and "controversies".

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

In the instant case, there exists no adversary relationship between the parties who were before the District Court, with respect to the issue of whether there exists past discrimination against black employees at Kaiser's Gramercy plant. Yet, it is just this issue upon which the majority for the Court of Appeals says the case turns. *Weber, supra* at 224. In just such cases in the past, where there was an absence of an indispensable party to a controversy, this Court has mandated the dismissal of the action. *California v. Southern Pacific Company*, 157 U.S. 229, 251 (1895); *Commonwealth Trust Company of Pittsburgh v. Smith*, 266 U.S. 152, 159 (1924). This is especially necessary when "an important public interest is at stake" such as the placing in jeopardy of all voluntary affirmative action plans in the country. *United States v. Johnson*, 319 U.S. 302, 304 (1943).[2]

In addition to the above reasons, the black employees of Kaiser's Gramercy plant are also third party beneficiaries of the collective bargaining agreement between Kaiser and USWA. As such, they are entitled to enforce this agreement in District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. See *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Because of this right to affirmatively bring an action in District Court to protect their interests in the collective bargaining agreement, the black employees of Kaiser's Gramercy plant are the only parties who are in a position to defend their interests in that agreement.

---

[2] Although the issue of the appropriate allocation of power between the three branches of government is also a matter relevant to the "cases" or "controversies" question, this issue will not be argued other than to mention that the development of public policy with respect to remedying the past effects of societal discrimination is more appropriately left to the Executive branch (through Executive Order No. 11246 and the Office of Federal Contract Compliance) and the Legislative branch (through debates on the changes in legislation such as the 1972 proposed amendments to Title VII—see *Weber, supra* at 238) rather than judicial intervention.

This is so especially when their union, the USWA, has a contrary interest in keeping free of any taint of responsibility for any past discrimination.

II.

VOLUNTARY AFFIRMATIVE ACTION PROGRAMS SHOULD BE CONSIDERED PRESUMPTIVELY VALID, WHEN SUPPORTED BY STATISTICS WHICH SHOW A DISPARATE IMPACT UPON THE CLASS OF EMPLOYEES WHICH THE AFFIRMATIVE ACTION PROGRAM WAS DESIGNED TO HELP.

A. Judicially Ordered Affirmative Action Plans To Remedy The Effects Of Past Discrimination Are Valid.

Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides a broad grant of authority to the courts to develop affirmative action plans to remedy the effects of past employment discrimination, by providing preferential treatment to the discriminated-against class. *Franks v. Bowman Transportation Company*, 424 U.S. 747, 763-770 (1976); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919; *United States v. International Brotherhood of Electrical Workers, Local No. 38*, 428 F.2d 144 (6th Cir., 1970), *cert. den.* 400 U.S. 943.

B. Affirmative Action Plans Mandated By Executive Order No. 11246 To Correct The Effects Of Industry-Wide Discrimination Are Valid.

Executive Order No. 11246, 3 C.F.R. § 339 (1964-65 compilation), provides for affirmative action plans to remedy the disproportionately low number of minority people in the construction industry, when working on federal contracts. The beneficiaries of these plans are not necessarily those individuals who were discriminated against in the past, but rather are of the same racial class. These plans have been specifically upheld by the

courts as Constitutional. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971), *cert. den.* 404 U.S. 854; *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir., 1972). Thus, the courts have validated affirmative action plans which provide for preferential treatment to be given to members of a discriminated-against class, even though the particular members of that class have not individually suffered the effects of the class-wide discrimination.

C. The Purpose Of Title VII Is To Provide Equality Of Employment Opportunity And To Remove The Barriers That In The Past Have Favored White Employees Over Other Employees, And, To The Extent Possible, To Accomplish This By Voluntary Means.

It is generally understood that the purpose of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Company*, 401 U.S. 424, 429-430 (1971); See also, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977). This characterization is clearly to protect the minority classes from the majority, privileged class of white males. In individual instances, a white male may claim protection under Title VII for overt discrimination against him because of his race or sex, but this Court has never held that white males, as a class, are discriminated against because of the implementation of an affirmative action program. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 281, fn.8 (1976).

Further, the statutory intent is to correct the discriminatory employment practices through voluntary

compliance rather than through litigation. Litigation is the procedure available to the Equal Employment Opportunity Commission (hereinafter "EEOC") after attempts at conciliation fail. "Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked." *Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50, 72 (1975). See also, *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367-368 (1977).

In addition to the conciliation process mandated by the Act prior to the institution of any court action by the EEOC, the Act contemplates that there will be voluntary compliance without the intervention of the EEOC at all. This is based, in part, upon the threat of a possible future court action.

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 417-418 (1975), quoting from *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir., 1973).

The utilization of the collective bargaining agreement as the vehicle through which voluntary remedial action is to be taken is the easiest and most practical method for employers and unions to come to an understanding about how they will resolve the disparate impact various practices have had on different classes of employees. This Court, in *Franks v. Bowman Transportation Company*, 424 U.S. at 778-779, stated:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. *Pellicer v. Brotherhood of Ry. & S.S. Clerks*, 217 F.2d 205 (CA5 1954), cert. denied, 349 U.S. 912 (1955).

As seen above, this Court has given its approval to the collective bargaining process to go beyond what is required by Title VII in order to eliminate the effects of discrimination on the basis of race. This can only be interpreted as a mandate for all employers and unions to implement affirmative action plans to remedy all disparate impact on employees on the basis of race. Kaiser and USWA have heeded the Court's advice and implemented an affirmative action plan which rectifies the disparate impact felt by black employees and other minorities in the craft areas. *Weber*, contrary to the Court's intent, has disrupted that affirmative action plan.

D. If *Weber* Is Upheld, The Result Of This Case Will Be The Complete Destruction Of All Voluntary Affirmative Action Plans.

Assuming, *arguendo*, that the Court were to affirm the Court of Appeals and rule in favor of Weber, it is instructive to see that the effect of such a decision would constitute the complete destruction of the Congressional purpose behind Title VII. First, all affirmative action plans, instituted without the intervention of the govern-

ment, would be voluntarily dismantled. Failure to do so would result in either alleged "reverse" discrimination against whites who are overstepped by such plans, or an admission of past discrimination which would likely lead to numerous lawsuits being brought by blacks, or other minorities, taking advantage of this admission. No employer or union would desire to be caught in such a trap.

Second, affirmative action plans implemented during the conciliation stage of the Title VII procedure, are likely to be discarded. Usually those plans are implemented pursuant to a specific disclaimer as to liability or commission of wrongdoing. In the face of this disclaimer, the affirmative action plan has just as much validity as if it were entered into voluntarily.

Finally, those affirmative action plans entered into as a result of a consent decree, without any significant fact-finding by the Court, would be reevaluated and, most likely, set aside, since they are not based upon proof of past discrimination.[3]

The result of this would be a significant increase in the number of Title VII cases that are filed and processed to trial. In addition, there would be a greater increase in disparate impact on minority employment, since only judicially-ordered affirmative action plans would be in effect.

---

[3] The most famous consent decree came in the case of *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir., 1975), and essentially provided an industry-wide affirmative action plan for the steel industry which served as the model for the instant affirmative action plan. The consent decree court "has issued an order to show cause why changes are not required in the decree in light of the decision below". *USWA v. Weber*, No. 78-432, Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed September 14, 1978, at 11.

The exact opposite of the purpose for Title VII would be obtained if Weber is successful in this action.

E. Judicial Sanction Should Be Granted To Voluntary Affirmative Action Programs.

Instead of undermining the purpose and intent of Title VII, the Court should bolster that purpose, by placing the stamp of approval on voluntary affirmative action plans. Any affirmative action plan which is entered into in order to correct a disparate impact upon a racial or gender-based class, which can be shown by way of statistics, should be presumed to be valid, subject to rebuttal by evidence that such disparate impact is not lessened by said plan.

Only through this utilization of presumptive validity for affirmative action plans, which have the effect of correcting disparate impacts on minority peoples, can the concept of voluntary compliance with Title VII be preserved. Anything short of this standard will result in the complete emasculation of voluntary compliance.

III.

PROOF OF PAST DISCRIMINATION BY KAISER EXISTS IN THIS CASE, REQUIRING THE APPROVAL OF THE AFFIRMATIVE ACTION PLAN TO CORRECT THE PAST DISCRIMINATION, OR REMAND FOR FURTHER EVIDENCE.

Proof of discrimination, which constitutes the reason for the implementation of the affirmative action plan in this manner, can easily be shown by way of statistical evidence. Such evidence is sufficient to establish, at a minimum, a *prima facie* case that there exist effects of past discrimination requiring the remedy of affirmative action. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 339. Based upon the statistics provided by Judge Wisdom in his dissenting opinion,

Weber, supra at 228, the black workforce constitutes 39 per cent of the available workforce in the parishes from which Kaiser's Gramercy plant draws, although only 14.8 per cent of the workforce actually at the Gramercy plant is black. Of the craft employees, less than 2 per cent (five out of 290 employees) are black. These statistics, on their face, create a *prima facie* case that there was prior racial discrimination, which is unrebutted. This evidence requires the reversal of the Appellate Court's decision, since it refutes the fact upon which that decision rests.

CONCLUSION

Amicus Curiae files this brief to urge the Court to reverse the judgment and opinion of the Court of Appeals with instructions to the District Court to dismiss the case. In the alternative, *Amicus Curiae* recognizes that the evidentiary record in this case is less than complete, and so urges the Court to remand the case to the District Court with instructions to develop a full and complete record, with full representation for all parties of interest.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 25 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
KAISER ALUMINUM & CHEMICAL CORPORATION,
UNITED STATES AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

v.

BRIAN F. WEBER, ET AL.

BRIEF OF THE NATIONAL MEDICAL ASSOCIATION, INC. THE NATIONAL BAR ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION AMICI CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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United States v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975) 46
United States v. *Chesapeake and Ohio Ry.*, 471 F.2d 582, (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) 52
United States v. *City of Chicago*, 549 F.2d 415 (7th Cir., 1977), *cert. denied*, 434 U.S. 875 (1977) 31

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United States v. *Hayes International Corp.*, 457 F.2d 112, (5th Cir. 1972) 52
United States v. *I.B.E.W., Local 38*, 428 F.2d 144 (6th Cir., 1970) *cert. denied*, 400 U.S. 943 (1970) 31
Wade v. *Mississippi Cooperation Extension Services*, 528 F.2d 508, (5th Cir. 1976) 52
Washington v. *Davis*, 426 U.S. 229 (1976) 51, 52
Youngstown Sheet and Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 41

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115 Cong. Rec. 40.013 (1960) 38
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117 Cong. Rec. 31975 42
118 Cong. Rec. 1385 (1972) 42
118 Cong. Rec. 1398 (1972) 42
118 Cong. Rec. 1671 (1972) 42
H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963) 28
H.R. 1746 *Before the Gen. Subcom. on Labor of the House Comm. on Educational and Labor*, 92nd Cong., 1st Sess. (statement of W. H. Brown, EEOC Chairman) 36
H.R. 1746 *Before the Subcomm. on Labor Senate Comm. on Labor and Public Welfare*, 92nd Cong., 1st Sess. (1971) (statement of L. H. Silberman, Under Secretary of Labor) 40
S. 931 *Before the Subcomm. on Separation of the Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 255 (1969) 40
S. Rep. No. 92-415, at 30-3 42

Page

EXECUTIVE ORDERS:

Exec. Order 11246, 41 C.F.R. 60 ..... Passim

OTHER AUTHORITIES:

Abraham, Kenneth, *Intention and Authority in Statutory Interpretation*, (unpublished essay, Associate Professor of Law, University of Maryland School of Law, 1977) 26
Aristotle, *Book V of the Nicomachean Ethics*, 11319-13 20
Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development*, 20 St. Louis Univ. L.J. 225 (1976) .. 55, 57
Bickart, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. Rev. 590 (1969) 39
1974 Black L.J. 132, 151 20
Black, *Labor and the Negro* (1866-1910), 50 Journal Negro History 163 (1965) 16
Comment, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts*, 17 U.C.L.A. L.Rev. 817 (1970) 39, 40
"Developments-Equal Protection," 82 Harv. L. Rev., 1160 (1969) 20, 22
Donegan, Charles, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity in the Construction Industry Or More Pie in the Sky*, 20 Kansas L. Rev. (1972) 35
DuBois, *The Legality of the "Revised" Philadelphia Plan*, 30 Md. L.Rev. 113 (1970) 39
Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge, Mass. (1977) 20, 21, 23, 25
Edwards, Harry, *Race Discrimination in Employment: What Price Equality?* 1976 U. of Ill. L.For. 572 .. 28
Hardgrove, *The Philadelphia Plan*, 45 Notre Dame Law Rev., 678 (1970) 39

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Jones, James E., *The Bugaboo of Employment Quotas*, 1970 Wis. L.Rev. 341 ..... 12, 39, 45

Krakower, *The Constitutionality of "Affirmative Action" to Integrate Construction Trades: The Philadelphia Plan*, 43 Temp. L.Q. 320 (1970) 39

Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 Cornell L.Q. 84 (1970) 39

Marshall, *The Negro and Organized Labor* (N.Y. 1965) 17

Myrdal, Gunther, *An American Dilemma* (New York, 1944) 13

Northrup, *Organized Labor and the Negro* (New York, 1971) 15

Note, *The Philadelphia Plan: Equal Employment in the Construction Trades*, 6 Colum. L. J. & Soc. Prob. 187 (1970) 39

Rawls, John, *A Theory of Justice* (1971) 23

Ross and Hill, *Employment, Race and Poverty* (New York, 1967) 14, 15, 16, 18

Schuwerk, Robert P., *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. of Chicago L.R. 4 (1972) 38

Thompson, Roger, "Test Failures Linked to Low Family Income," *The News and Observor*, p. 1 (January 11, 1979) 19

Washington Post, Dec. 20, 1969, at A-1, col. 6 38

White, Haydan, *Tropics of Discourse—Essays in Cultural Criticism* (Johns Hopkins University Press, 1978) 27

Williams, Bernard, "The Ideal of Equality," in H. Bedau (ed.) *Justice and Equality* (1971), p. 127 . 22, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
KAISER ALUMINUM & CHEMICAL CORPORATION,
UNITED STATES AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

v.

BRIAN F. WEBER, ET AL.

BRIEF OF
THE NATIONAL MEDICAL ASSOCIATION, INC.
THE NATIONAL BAR ASSOCIATION, INC.
AND
THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION
AMICI CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 564 F.2d 217 (1977). The opinion of that court denying rehearing is reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1976).

JURISDICTION

The petition for a Writ of Certiorari was filed on September 14, 1978 and granted on December 11, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether, in the absence of a judicial determination of past discrimination, an employer and a union may enter into a collective bargaining agreement, adopting a training program, based inter alia, upon a racial criterion, to remedy the historical exclusion of Blacks from craft positions of one of the employers plants.

CONSENT TO FILING

This Amici Curiae is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICI CURIAE

The National Medical Association is a professional organization which represents the 9,300 American Physicians who are black. The objectives of the National Medical Association are to raise the standards of the medical profession and of medical education; to stimulate favorable relationships among all physicians; to nurture the growth and diffusion of medical knowledge; to sponsor the education of the public concerning all matters affecting the public health; to sponsor the enactment of just medical laws; and to eliminate religious and racial discrimination and segregation from American medical institutions.

The Association was formed in 1895 in Atlanta, Georgia, and incorporated in St. Louis, Missouri, August 31, 1923, under the laws of the State of New Jersey.

The Association maintains national headquarters at 1720 Massachusetts Avenue, N.W., Washington, D.C. (20036). It publishes a monthly scientific journal entitled The Journal of the National Medical Association and an all membership news and features publication entitled NMA News. Its president is Dr. Jesse Belmont Barber, Washington, District of Columbia.

The National Bar Association, 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization which represents the more than 7,000 black attorneys, judges and law students in the United States. The officers of the Association are are follows:

President	Junius W. Williams, Esq.—Newark, NJ
President-Elect	Robert L. Harris, Esq.—San Francisco, CA
Vice President	William A. Borders, Esq.—Washington, DC
Vice President	Ronald S. Samuels, Esq.—Chicago, IL
Vice President	Ruth Harvey Charity, Esq.—Danville, VA
Vice President	Warren H. Dawson, Esq.—Tampa, FL
Secretary	Arnette R. Hubbard, Esq.—Chicago, IL
Treasurer	Arthenia L. Joyner, Esq.—Tampa, FL

The National Bar Association was incorporated under the laws of the State of Iowa in 1925, over two decades before black attorneys were allowed membership in the American Bar Association, and at the time

when very few law schools in the United States admitted black students.

The Articles of Incorporation of the National Bar Association state the objectives of the Association, in part, as being:

> ". . . to advance the science of jurisprudence, uphold the honor of the legal profession, . . . and protect the civil and political rights of all citizens of the several states of the United States."

One of the primary reasons for the birth of the Association in 1925, was to achieve equalization of opportunities for minorities in the legal profession in order to further the goal of equal justice for all. In its fifty-four years, the Association has seen the number of black attorneys in the United States grow from a fraction of a percentage of the total, to almost two percent today. However, Blacks, as well as other minorities and women, are still grossly under-represented in the legal profession and also the medical and other professions.

Thus far, the most effective methods proven to ameliorate that condition and certainly the most critical factors in doubling the number of black attorneys in America in the past decade, has been the affirmative action programs initiated in a number of law schools since around 1968. This was also the year that the National Bar Association, in partnership with the American Bar Association, the American Association of Law Schools and the Law School Admissions Council, founded the Council on Legal Education Opportunity whose stated goal was to increase the enrollment of minority students in American law schools.

The legal profession has perhaps been more significant than any other in shaping the fortunes and destinies of the American people, majority and minority alike. It is common knowledge that until a few years ago, all but a miniscule number of Blacks were excluded from the profession. In fact, as recently as 1950, Blacks were forced to invoke the powers of the United States Supreme Court in order to gain admission to tax-supported law schools in parts of this country. Although the situation has improved somewhat today, it would not be inaccurate to state that at our present rate of progress, we are still many years away from true equality in our justice system and proportionate representation of Blacks in the legal profession. Consequently, this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination.

Blacks and other minorities, as well as women, stand to lose tremendous grounds which have been accomplished under the rubric of affirmative action. By affirmative action, we mean those series of programmatic efforts designed to fully integrate minorities and women in this country into equal employment opportunity, minority entrepreneurship and equal educational opportunity.

The National Association For Equal Opportunity in Higher Education (NAFEO), 2001 S Street, N.W., Washington, D.C. (20009), founded in 1969, is a nonprofit, voluntary, independent association of 105 historically black colleges and universities enrolling some 200,000 students.

Its Board of Directors and officers are as follows:

President—Dr. Charles "A" Lyons, Jr., Fayetteville State University, North Carolina

Vice-President—Dr. Luther H. Foster, Tuskegee Institute, Alabama

Vice-President—Dr. Frederick S. Humphries, Tennessee State University, Tennessee

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Dr. Samuel D. Cook, Dillard University, Louisiana

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Dr. Lionel H. Newsom, Central State University, Ohio

Dr. John A. Peoples, Jr., Jackson State University, Mississippi

Dr. Henry Ponder, Benedict College, South Carolina

Dr. Prezell R. Robinson, Saint Augustine's College, North Carolina

Dr. James A. Russell, Jr., Saint Paul's College, Virginia

Dr. Julius S. Scott, Jr., Paine College, Georgia

Dr. Harison B. Wilson, Norfolk State College, Virginia

Executive Director—Dr. Samuel L. Myers[1]

NAFEO is organized to articulate the need for a higher education system where race, income, and previous education are not the determinants of either the quantity or quality of higher education.

This is an association of those colleges and universities which are not only committed to this ultimate goal, but are now fully committed in terms of their resources, human and financial, to achieving this goal. The Association seeks to provide a unified framework representing historically black colleges in their attempt to continue as viable forces in American society.

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[1] See Appendix A, which list the Presidents of the traditionally Black Institutions of Higher Education which constitute the membership of the National Association for Equal Opportunity in Higher Education.

Black colleges were founded to serve those who have been severely crippled by over 200 years of dehumanizing slavery and chronic poverty. The main goal of this Association, through the efforts of its collective membership, continues to be the elevation of disadvantaged youth to creative citizenship.

These institutions, which enroll upwards of 200,000 students, have historically enabled those who were disenfranchised, exploited and humiliated to gain access to intellectual, cultural, moral and spiritual offerings. Since 1966, these institutions have awarded more than a quarter of a million undergraduate, graduate and professional degrees. They have been the providers and architects of equal educational opportunity with attainment and productivity for thousands of their students.

These institutions have been more committed to an open society in which racial and economic disadvantages can be overcome than any other educational institutions. They are totally committed to the production of graduates from families whose economic background makes the attainments of a college education almost impossible. Indeed, the historically black colleges are exemplars of policies and practices that, if used w dely across the country, could move the nation toward equal opportunity and effective "Affirmative Action."

The several Amici have unique interest in the resolution of this case by the Supreme Court. This case raises questions of great importance about the permissible scope of voluntary affirmative action under Title VII. Affirmance of that lower court's proscription against voluntary affirmative initiative will chill

voluntary affirmative action programs in particular and affirmative action generally.

STATEMENT OF THE CASE

Kaiser Aluminum and Chemical Corporation operates a plant in Gramercy, Louisiana. In 1969, a utilization study[1] done by the Office of Federal Contract Compliance (OFCC) revealed that while the local population was approximately 46% black and the local labor force was 39% black, less than 2% of the skilled craft positions at Kaiser's Gramercy plant were held by black employees. By 1974, the percentage of Blacks at the Gramercy plant increased only slightly.[2]

This gross disparity between the percentage of Blacks in the relevant labor force and the percentage of black employees in skilled craft positions of Kaiser's Gramercy plant was attributed to a history of discriminatory employment practices of unions and employers in the various skilled craft industries. There is also strong indication that the disparity was due to discrimination by Kaiser.

In an effort by Kaiser and the union, "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history," *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 418, in 1974 Kaiser signed a collective bargaining agreement with the United Steelworkers of America, AFL-CIO. The Agreement benefited both the white and black employees of Kaiser. By removing the requirement

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[1] 41 CFR 60-2.

[2] The percentage of black employers at the plant increased by approximately 1%.

for prior craft experience, to qualify for on-the-job training and by agreeing to recruit its future craft employees from within rather than at the gate, as the previous practice had been, this Agreement under attack by Weber conferred substantial benefits to the white employees. In order not to reinforce and continue the effects of prior discrimination and exclusion of Blacks from the work force, the Agreement created dual seniority lines: one black and one white. The Agreement established an entrance ratio of at least one qualified minority worker to every white worker until such time as the percentage of minority workers in craft positions at Kaiser's plants was commensurate with the percentage of minorities in the relevant force. To implement this plan, dual seniority lists were established. For every two vacancies in the training program, one white and one black employee were to be selected on the basis of their seniority within their respective lines.

In April of 1974, the Gramercy plant announced that there were three programs available for on-the-job training. All plant employees were eligible to bid for the positions. Eligibility for admission was determined on the basis of plant seniority. However, black and white applicants were selected from their separate seniority lists.

Respondent Weber, a white employee at Kaiser's Gramercy plant, applied for each of the training programs but was not selected. Two black applicants with less plant seniority than Weber were selected. Weber subsequently filed a complaint in the District Court for the Eastern District of Louisiana. While relying upon parts of the Agreement under assault, he challenged that part of the Agreement providing for dual

seniority as being in violation of Sections 703(a) and (d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (d). The District Court held that Kaiser's plan was violative of Title VII. Further, that affirmative action programs can be imposed only after a judicial determination of past discrimination.

The Court of Appeals for the Fifth Circuit affirmed one judge dissenting.[3] However, the Court rejected the District Court's conclusion that affirmative action programs can be imposed only after a judicial determination of past discrimination. It agreed with the District Court that in this instance the use of racial quotas violated Title VII. This determination was based on the District Court's ruling that Kaiser had no history of discriminatory employment practices against Blacks.

The Court of Appeals rejected appellant's contention that if the racial quota was not sanctioned by Title VII, it was sanctioned by Executive Order 11246 and the OFCC regulations. The Court held that the Executive Order and OFCC regulations must give way to the congressional mandate of Title VII, and that Title VII does sanction the use of the racial criterion herein employed.

I.

THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT A PLAN WHICH GIVES RACIAL PREFERENCE IS VIOLATIVE OF TITLE VII, IN THE ABSENCE OF A SHOWING OF PAST DISCRIMINATION

In the field of employment, societal discrimination has particularly gruesome effects on the lives of those who are the objects of that discrimination. These evil

[3] Judge Wisdom dissented.

effects may never be mitigated without some form of preferential treatment. Justices Brennan, White, Marshall, and Blackmun have acknowledged this assertion, evidenced by the following language:

> "Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefitted suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. (*Regents of the University of California* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733, 2787. See Justice Powell's response at page 2658, fn. 44).

And Professor Jones has likewise observed that,

> "The most difficult job in eradicating racial discrimination in employment is the task of eliminating the present effect of past discrimination." Jones, *The Bugaboo of Employment Quotas,* 1970 Wisc. L. Rev. 341, 342.

The history of this past discrimination was the impetus for the enactment of Title VII of the Civil Rights Act of 1964. It demonstrates that Congress realized that the present effects of past racial discrimination could not be remedied by being neutral on the question of race, in the area of employment. What is needed and

what Congress intended, was preferential treatment: judicially mandated, administratively imposed, or voluntarily adopted.

Blacks have suffered the dehumanizing effects of racism since the inception of this nation. Fear and racial hatred have assumed many disguises throughout our history. For though the chains and whips have been discarded, more sophisticated methods and institutional practices are used today to perpetuate the effects of racism.

In both the North and the South, the black slave was barred from almost every avenue leading to a productive, dignified existence. And his experience in the labor market, over the last two centuries, is one of the best illustrations of the lasting effects of institutionalized slavery.

In the South, after the Civil War, the black man seeking a job found that the years of enslavement had predetermined that he was to be admitted to the lowest forms of employment, even though, quite frequently, he was a skilled craftsman. It is commonly known that during slavery, Blacks were used as domestics and unskilled laborers. A less commonly known fact is that the slaves, ". . . were also, to a large extent, the craftsmen and mechanics. They were carpenters, bricklayers, painters, blacksmiths, harness workers and shoemakers. For even skilled labor was degraded and whites had often been denied the opportunity of acquiring training since masters had preferred to work with slaves." Myrdal, Gunther, *An American Dilemma,* (New York, 1944). White artisans strongly protested against the use of slaves for skilled craft labor, but the skilled slave was protected by his more politically powerful master.

However, after the Emancipation, the black artisan was on his own. His former master no longer had an interest in protecting him against his white competitor. See Myrdal, *supra.*

Therefore, the early post Civil War period was marked by a pattern of discrimination against the black worker and his consequent exclusion from the labor market. Thus, in the skilled crafts, as well as mines, factories, and docks, whites gradually moved in and Blacks were left out. And with the rise of craft unionism and the apprentice system in periods between 1865 and 1885, white artisans consolidated their hold on the jobs formerly held by Blacks—particularly those jobs in the building trades and on the railroads.

Technological change had further accelerated the process of substitution; first, by making the skills of the Negro increasingly obsolete, and, secondly, by often rendering the work less strenuous and dirty, thus encouraging the redefinition of former "Negro jobs" as "white men's work."

The history of organized labor tells a similarly sad tale of exclusion of the black worker. "From its inception as a national movement, organized labor found it necessary to deal with the prevailing attitudes of American society toward the blacks population. In 1866, the National Labor Union held its first convention, and was immediately confronted with the need to formulate a policy on racial practices. At its second convention in 1869, it requested black delegates to form their own "all-Negro labor organizations." Ross and Hill, *Employment, Race and Poverty;* (New York, 1967), p. 365. The National Labor Union's policy of exclusion of Blacks was adopted by many major

unions. "The history of the American Federation of Labor (AFL), the most successful national labor organization, demonstrates that labor unions not only accepted racial discriminations but significantly contributed to the pattern of discrimination and segregation." *Ross & Hill,* Id., at 366. AFL unions used a variety of tactics to eliminate or limit Blacks as a group from competition in the labor market. They excluded Blacks from membership by racial provisions in their constitutions or ritual by-laws or by tacit agreement in the absence of written provisions. Segregated locals and "auxiliary" locals are established by the larger unions. The black worker was extended the privilege of joining and paying dues but, generally, he was barred from participating in union affairs and contract negotiations. *Northrop, Organized Labor and the Negro,* (New York, 1971), p. 2. AFL unions also controlled licensing boards that excluded black workers from craft occupations and apprenticeship training programs. *Ross & Hill, supra.* Blacks were also denied access to union hiring halls where such halls were the exclusive source of labor supply.

The consequences of these institutional practices of discrimination against the black worker remain manifest. By the turn of the century, this color-caste system had become firmly entrenched. By 1900, Blacks had become almost completely segregated from the mainstream of labor by law and by custom.

> "In the last years of the nineteenth century and in the first decades of the twentieth, the harsh discriminatory racial practices of AFL-affiliated unions and the railroad brotherhoods were decisive factors in developing the pattern of Negro job limitations that was to continue for many generations. Because of the AFL's craft orientation and discriminatory practices, most unions refused to

> organize Negro workers in the 1900's, thus denying them trade union protection during a period of intense labor exploitation. The consequences of the pattern of discriminatory racial practices by organized labor was an important and in some instances decisive factor in the barring of Negroes from full and equal protection in the economic life of the nation." *Ross, supra.*

And:

> "During the period 1860-1910, craft unions contended that they were not acting with any malice towards Negroes; they did rearticulate, in a new form (into our industrial structure), which has pervaded the social structure and social consciousness of society in the United States. Since "socially," Negro inferiority is sanctioned, unions have used exclusion as an economic weapon to maintain and raise the economic social status of their members. The acceptance of Negro subjugation is linked partially, with economic preservation in an unstable society: the latter fits well with the doctrine of job scarcity. Thus, artificial restriction serves at least a two-fold purpose: (1) it enhances the bargaining power of the union; (2) it increases the union's economic control over its membership." Black, *Labor and the Negro,* 1866-1910, 50 Journal Negro History 163 (1965).

The Blacks who migrated to the North entered the unskilled, manual jobs in steel mills, auto plants, road maintenance, laundries, feed industries and some branches of the needle trades. As a rule, these were the jobs that Whites and immigrants did not want or had vacated to take better positions.

The entry of Blacks into the Northern labor market was further hampered by the prevailing racial attitudes of that period. The white workers strongly resented the

immigration of Blacks to the North, especially when the black workers were brought to the North by employers to be used as strikebreakers, cheap labor, or as a means to avert unionization. See, *Marshall, The Negro and Organized Labor,* (N.Y. 1965) p. 21

The hostility and aggression of the white workers took on many forms. Blacks were victimized and terrorized by riots and other acts of violence. In 1917 and 1919 tensions between the white workers and the Blacks from the South erupted into some of the most bitter and bloody race riots in this country's history. St. Louis and Chicago became the battle-grounds of fierce, racial conflicts.

It is submitted that these open and covert practices of exclusion of black workers had the net effect of securing for the white worker the advantages of job security and economic development. This argues for a reading of the Civil Rights Act and the lawfulness of the Kaiser Plan, in particular, in light of what has been stated above. We argue that it is against this background that steps have been taken to mitigate the conditions of Blacks; to wit, the late President Kennedy's assembling of the Committee on Equal Employment Opportunity. This committee, chaired by the then Vice President Lyndon Baines Johnson, urged some of the major companies to recruit Blacks. This effect resulted in the Lockheed Plant at Marietta, Georgia, the Western Electric Company, and the Bell Telephone System actively recruiting Blacks for jobs as plant supervisors, low and middle management positions. Also, Vice President Johnson had the majority of the "one hundred largest corporations in the country sign pledges to actively further the employment of Negroes and other minorities." By August, 1964, the plan was extended,

and 238 firms with an aggregate employment of 8,000,000 workers, participated. As a result of these pledges:

> "Negro college graduates became the most sought after of the job seekers. Programs were set up at the industry's expense in most major cities, . . . to recruit or to train Negroes in a variety of jobs from machine operators to salesman and from office clerks to computer programmers." *See Ross and Hill, supra* at 298-299.

Employers were therefore actively recruiting minorities in order to increase minority representation at all levels of industry. This acknowledged that Blacks were underrepresented in certain job categories and thus it was found necessary to remedy the inequities caused by employment discrimination. We argue that the Civil Rights Act of 1964 was passed to give legal sanction to this voluntary practice of encouraging the employment of Blacks. This means that race was a most significant criterion for obtaining employment.

It is the position of this brief that the Fifth Circuit Court of Appeals erred in declaring that the voluntary plan adopted by Kaiser, in the absence of specific showing of past discrimination, was in violation of the Civil Rights Act of 1964. The company plant in question, having begun operations only over a decade ago, could not have engaged in the same discriminatory practices as of its older, sister companies. Moreover, the plan adopted parallels the Kennedy-Johnson plan initiated over a decade ago. The Fifth Circuit, by its ruling, suggests that racial classification not be used in voluntary plans adopted by employers to promote the employment of Blacks. But this ignores the fact that the systematic exclusion of Blacks from the labor force now

gives rise to a moral claim that they be given some form of preferential treatment.

This ruling of the court clearly overlooks the history of black workers detailed above; and ignores the moral distinction between a racial classification designed to discriminate against those who have suffered the effect of slavery, and a racial classification that serves to eliminate the plight of these very people who have traditionally suffered from that discrimination.

In concluding, we note that today an inordinately high percentage of the black population are poor. This poverty is a direct consequence of their history of unemployment. The poor are also less educated than Whites. It hardly merits argument to say that there is a correlation between their poverty and their ignorance. For example, on January 10, 1979, when the State of North Carolina announced the results of the state-wide Competency Test, state officials explained that the test results showed that school systems with the higher than average failure rates had two key characteristics in common: relatively low family income and relatively low levels of adult education attainment. Thompson, Roger, "Test Failures Linked to Low Family Income," *The News and Observer,* at 1, (January 11, 1979). It is submitted that these two conditions reinforce each other, thereby creating a vicious cycle out of which the black and the poor may never break, without some form of preferential treatment. And this preferential treatment merely fosters the ideal of equality, a concept articulated in the Constitution. Failing this preferential treatment, these poor will forever remain trapped in this vision of a "second hell."

In political philosophy the concept of equality has been given eloquent treatment. Aristotle, in his *Nico-*

machean Ethics, noted the utter significance of this concept to the "political man" when he stated that "justice is equality as all men believe it to be, quite apart from any argument." Thus, he distinguished two principles of justice: "rectificatory" justice (involving strict or "arithmetic" equality and distributive justice (involving proportional or "geometrical" equality), that is, a distribution in accordance with unequal merit). Aristotle in Book V of the *Nicomachean Ethics* 11319-13.

The principle of numerical equality often considers those respects in which men are different as being irrelevant for the distribution of benefits and burdens among members of society. An obvious advantage of this principle is the ease of administration and the justification of inequalities in terms of social utility. It is submitted that this principle of numerical equality is inappropriate in the distribution of scarce goods, where this simplistic adherence to a kind of formal equality is, by definition, impossible. 1974 Black L.J. 132, 151.

In contrast, the principle of proportional equality takes cognizance of differences among men and may require different treatment based on these differences. *"Developments—Equal Protection,"* 82 Harv. L. Rev. 1160, 1165. These may be differences of merit, or differences of need. The question is whether these differences give rise to any moral claims as a predicate for differential treatment among those who must share the scarce benefits. The reason articulated to justify unequal treatment is all important; for arguments about equality are, in fact, arguments about criteria of relevance.

Professor Ronald Dworkin has contributed much to our understanding of this rather complex concept. In

his major work, *Taking Rights Seriously,* (Harvard University Press, Cambridge, Mass., 1977), he has delineated two principles that take equality to be a political ideal. The first requires that the government treat all those in its charge as equals, that is, as entitled to its equal concern and respect. The second principle requires that the government treat all those in its charge equally in the distribution of some resource or opportunity, or at least work to secure the state of affairs in which they all are equal or more nearly equal in that respect.

The first principle is taken to be fundamental because it purports to recognize the inherent equality of all men. It is conceded that, sometimes, treating people equally is the only way to treat them as equals. But this is not always the case. Take the instance of a mother with two children whom she loves equally. One child is gravely ill; the other is slightly so. The mother, having a very limited supply of medicine, may decide to give half to each child. But, to do this is to ignore the very special need of the child who is gravely ill. In this instance, the mother cannot be said to have treated the children as equals by giving them equal treatment. To treat them as equals she has to take into consideration any special circumstances making for unequal or differential treatment; thus giving to the child who is gravely ill, either all or most of the medicine. This does not say that she has no concern or respect for the child who receives less. Rather, it suggests her concern and respect; and, if the situation were reversed, then, according to the principle upon which the unequal distribution is made, the child who now receives less, would receive more. This example is to make the rather significant point that to treat

people as equals is fundamental, and to accord them equal treatment is derivative of this more fundamental principle.

The question remains: When is it justified to treat people differently—more specifically, when is it justified to treat Blacks differently from Whites. The fact of being black is not, *ipso facto,* a predicate of a moral claim. But the fact of blackness, in correlation with certain other considerations, may give rise to a moral claim for differential treatment.*

Earlier on, we noted that differences among men may be based on need or merit, and in certain circumstances, either of the two may be the basis for differential treatment. But we argue that distribution according to merit operates on principles too closely akin to those at work in the competitive context of the private sector of this society. By making an individual's merit the relevant criterion for determining his proper allocation of burdens and benefits, the State purports to measure—and to reward accordingly—the individual's perceived value to society for some particular purpose. 82 Harv. L. Rev., *supra* at 1166. It harmonizes well with the concept of a free market economy and justifies its use on principles of utility.

This principle, in certain contexts, harbors grave dangers for Blacks, because it ignores the historic reason for their unequal circumstance. The instance of the *Weber* case is instructive, if merit—work experience—were—is taken to be the only relevant basis for the distribution of the scarce benefit. Thus, in the case of merit, one cannot properly speak of the distribution

* Williams, Bernard, "The Ideal of Equality," in H. Bedau(ed) *Justice and Equality* (1971), p. 127.

of a certain good without taking into consideration the distribution of the opportunity of achieving that good. Bernard Williams, p. 127. Therefore, in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable positions. The idea is to redress the bias of contingencies in the direction of equality. Rawls, John, *A Theory of Justice* (1971), p. 100. Witness Professor Dworkin's thoughtful and impassioned plea for the proper use of preferential treatment.

> "We are all rightly suspicious of racial classification. They have been used to deny, rather than to respect, the right of equality, and we are all conscious of the consequent injustice. But if we misunderstand the nature of that injustice because we do not make the simple distinctions that are necessary to understand it, then we are in danger of more injustice still. It may be that preferential admissions programs will not, in fact, make a more equal society, because they may not have the effects the advocates believe they will. That strategic question should be at the center of debate about these programs. But we must not corrupt the debate by supposing that these programs are unfair even if they do work. We must take care not to use the Equal Protection Clause to cheat ourselves of equality." Ronald Dworkin, *supra* at 239.

In *Bakke, supra,* at page 2782, in the opinion by Justice Brennan, joined in by Justices White, Marshall and Blackmun, it was observed:

> "The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors

must be "[c]onstitutionally an irrelevance," *Edwards* v. *California,* 314 U.S. 160, 185, 62 S.Ct. 164, 172, 86 L.Ed. 119 (1941) (Jackson, J., concurring), summed up by the shorthand phrase. "[O]ur Constitution is colorblind," *Plessy* v. *Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."

And Justice Marshall in the same case, *Bakke, supra,* at page 2803, noted:

"In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. . . .

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a University may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors."

And Justice Blackmun:

"I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy." *Bakke, supra* at 2808.

In the *Weber* case, the applicable statute is Title VII of the Civil Rights Act of 1964. We argue that the statute be read to promote this ideal of equality and foster the intent of the 14th Amendment.

The concept of equality is accorded constitutional status. More specifically, the Equal Protection Clause of the 14th Amendment, by its injunction—"no state shall deny to anyone the equal protection of the law" —makes the concept of equality a test of legislation, although it does not stipulate any fixed conception of that concept. The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men. Here is a moral right made into a legal right; the concept of an individual's right to equality is thereby made a constitutional right by the Equal Protection Clause. Dworkin, *Taking Rights Seriously, supra.*

This injunction of the 14th Amendment, we have observed, does not take the form of a precise rule but, rather, as a general standard to be appealed to. Not having articulated a particular conception of that standard, the Framers may have intended that the Court be charged with responsibility of developing and applying its own conception of equality as controversial cases arise. This is not to say that the judges are free merely to state their intuitions on the matter. Rather, "the demand is made of the judges that decisions taken in the name of justice must never outstrip their ability to account for these decisions in a theory of justice, even when such a theory must comprise their own intuitions. It demands that we act on principle rather than on faith. . . . It presupposes that articulated

consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any theory of justice. . . ." Dworkin, *Id.*

Thus, when faced with a case as controversial as *Weber*, the interpretive strategy adopted to render a meaning of the 14th Amendment, and other statutes in question, is of utmost importance. Interpretive strategy means "a method of reading—a direction or set of directions concerning the kind of evidence that may be considered the purpose of reading a particular text, the function or character of the text being read, or any other constraint of a reader's authority." Abraham, Kenneth, *"Intention and Authority in Statutory Interpretation"* (unpublished essay, Associate Professor of Law, University of Maryland School of Law, 1977), p. 2. It is submitted that "no text is accessible apart from the interpretive strategies invoked by its readers."

This comment affords valuable insight in respect to the interpretation of the 14th Amendment and the Civil Rights Act of 1964, within the context of the *Weber* case. The Court must interpret these documents so as to take account of the moral right of the individuals. As we have noted, the Constitution's guarantee of "equal protection of the laws" does not, in plain words, determine that race may never be used as a form of classification for the purpose of distributing a scarce benefit. But neither does it provide that, as a matter of constitutional law, the Court would be wrong to sanction such classification. The problem is to determine when racial classification is justified and when it is not. The foregoing analysis of the concept of equality, argues for an interpretive strategy that takes account of the special circumstances of Blacks in this

society, as making out a moral claim for differential treatment. Such strategy fosters the ideal principle of equality; that is, the principle that holds that people be treated as equals and not merely be accorded equal treatment.

In respect to the Civil Rights Act of 1964, it may be argued that all racial classifications are excluded since the language of the statute seem to suggest that. In short, the authorial intent is suggested by a "literal" reading of the statute. But this is to ignore the thought that: "Literal readings are in fact those which are generated by interpretive strategies so transparent that they are not recognized." Sometimes these readings are correct; but at other times they are clearly inaccurate. Professor Hayden White's observation, taken from a slightly different context, makes the point: "And yet we are faced with the ineluctable fact that even in the most chaste discursive prose, texts intended to represent—'things as they are' without rhetorical adornment or poetic imagery, there is always a failure of intention. Every mimetic text can be shown to have left something out of the description of its object or to have put something into it that is unessential to what some reader, with more or less authority, will regard as an adequate description. On analysis, every mimesis can be shown to be distorted and can serve, therefore, as an occasion for yet another description of the same phenomenon, one claiming to be more realistic, more 'faithful' to the facts." White, Hayden, *Tropics of Discourse—Essays in Cultural Criticism* (Johns Hopkins University Press, 1978), p. 3.

The language of the Civil Rights Act, despite its seeming literalness, has been correctly interpreted by

the Court on previous occasions, not to preclude racial classification *per se.* In *Bakke,* for example, five Justices have decided that it is impossible to decide the case on statutory grounds without reaching the constitutional issue, because the statute does not condemn the Davis program unless the Constitution does. If we are correct that an interpretation of the 14th Amendment that takes account of race, in appropriate circumstances promotes the ideal principle of equality, then the 'lesser' document, Title VII, may not be interpreted to do otherwise.

At a time when Congress had before it overwhelming evidence that Blacks and minorities throughout this country were victims of systematic employment discrimination, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963), it enacted Title VII. Prior to the enactment Congress made a determination that efforts previously undertaken to "make whole" victims of employment discrimination, were not sufficient to erase the "incidence and depth of inequality [which] remain[ed] widespread. Discrimination continue[d] to exist in all parts of the country." *Id.* at 29.

Faced with studies which revealed that employment discrimination based on race was the rule, rather than the exception, it became evident that a "color-blind" remedy would not adequately achieve equality of employment opportunities.

> "In dealing with employment discrimination cases, the courts and various governmental agencies have demonstrated an awareness that the goal of equal opportunity cannot be effectively implemented solely pursuant to neutral employment practices." Edwards, Harry T., *Race Discrimination In Employment: What Price Equality?* 1976 U. of Ill. L. For. 572, at 591 (1976).

Congress, thus required that employers and labor unions be race-conscious in devising remedies to redress the prevalent problem of employment discrimination. Congress required that employers affirmatively act, ". . . to achieve equality of employment opportunities and remove barriers that . . . operate . . . to favor employees." *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

In enacting Title VII, Congress ordered, "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 424.

In addition to the removal of barriers to employment opportunities, Title VII was designed to "make whole" persons who have been denied an equal opportunity to earn an equal pay check. *Albemarle Paper Co.,* 422 U.S. *supra* at 417-422. To effectuate this "make whole" objective, Congress has, "vested broad equitable discretion in federal courts to order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763 (1976).

Appropriately tailored numerical remedies have long been upheld as a viable means of restoring equality of opportunity to persons historically denied equal employment opportunities. Such remedies insure representation of qualified minorities in a workforce and, "promptly [operate] to change the outward and visable signs of yesterday's racial discrimination and thus, . . . provide an impetus to the process of dismantling the

barriers, psychological or otherwise, enacted by past practices." *NAACP* v. *Allen,* 493 F.2d 614, 621 (5th Cir. 1974). It has been held that absent such numerical remedies, "[a]dequate relief may well be denied." *Id.* at 765.

This Court stated that, "ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act." *Franks* v. *Bowman Transportation Co., supra* at 766.

In *NAACP* v. *Allen, supra,* where the district court found that because of a history of racial discrimination, there was an absence of Blacks on the state police force, a quota system very similar to the one here at issue, was upheld on the basis that it was, "essential to make meaningful progress toward eliminating the unconstitutional practices and to overcome the patrol's 37-year reputation as an all-white organization . . ."

In *Allen,* the Court ordered the hiring of one qualified black for each white hired as a state trooper until 25% of the force was black. It further ordered that Blacks be admitted to each training position until Blacks comprised 25% of the training positions.*

The Court stated that,

> " . . . affirmative equitable relief grounded on the use of numerical racial quotas has been increasingly utilized by federal courts to eradicate the continuing effect of past discrimination. . . . Such relief has been specifically approved in employment discrimination litigation brought under Title VII . . . of the Civil Rights Act of 1964 . . . and other similar programs, which have been instituted pursuant to Executive Order. . . ." *NAACP* v. *Allen, supra,* at 619-620. *See also, Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir., 1974) (*en banc*), *cert. denied,* 419 U.S. 895 (1974).

* The 1970 Census revealed that 26.2% of the Alabama population was Black.

By creating dual seniority lines or implementing other affirmative action plans designed to award victims of discrimination seniority status which they presumably would have earned but for the disparate treatment, the employee in no way, "deprives other employees of indefeasibly vested rights conferred by the employment contract." *Franks* v. *Bowman Transportation Co.,* supra. The Supreme Court has long held that the expectations of the majority workforce arising from a seniority system may be altered, amended, or modified to remedy past discrimination. (*See,* Id.)

> "The Court has also held that a collective bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953).

It is submitted that plans designed to provide relief as remedy for past discrimination have been uniformly upheld by the courts. *See, e.g., Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert denied,* 416 U.S. 950 (1972); *United States* v. *I.B.E.W.,* Local 38, 428 F.2d 144 (6th Cir.), *cert, denied,* 400 U.S. 943 (1970); *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Davis* v.

County of Los Angeles, 556 F.2d 1334 (9th Cir. 1977), *cert. granted,* —— U.S. ——, 98 S.Ct. 3087 (1978).

Thus, until the evil effects of past discrimination are eradicated, the courts must continue to sanction race-conscious numerical remedies, where employers do not voluntarily adopt such remedies. In cases where employers, like Kaiser, voluntarily implement programs to erase the last vestiges of historical discrimination, they must be rewarded, and other employers must be urged to follow suit.

In the present case, the district court held that the on-the-job training plan violated Title VII. The trial court took the view that affirmative action programs could be implemented as a form of relief only by the courts and then "only in those limited cases where necessary to cure the ill effects of past discrimination." While the Court of Appeals rejected the District Court's conclusion that only courts could institute remedial programs involving racial quotas, it agreed with the District Court that, on the facts of this case, the use or racial quotas in the selection of those eligible for on-the-job training programs violated Title VII. The court's reasoning is that absent a showing of prior discrimination on the part of the employer, racial preferences could not be employed in response to general societal discrimination. The Circuit Court interpreted section 703(a)(d) and (j). Section (d) to mean:

> It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

In spite of these provisions of Title VII, the courts have interpreted section 706(g) to authorize all of the judicial remedies previously referred to. Even the Fifth Circuit in the instant case stated that there are exceptions to 703(a) and (j) carried out by the courts for judicial remedies under 706(g). Section 706(g) provides:

> "If the court finds that the respondent has initially engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

What the Fifth Circuit Court makes pivotal is not judicially erected as opposed to voluntarily instituted programmatic activity, but whether a program may be erected under sections 703(a)(d) and (j) without a showing of prior discrimination by the employer as opposed to societal discrimination.

The question is then reduced to an interpretation of sections (a)(d) and (j) and the intendment of Title VII.

The predicate for interpreting section 706(a) to include the judicial remedies employed by the courts also warrants this Court's conclusion that to promote the intendment of Title VII, voluntary plans are permissible and should be encouraged without a showing of prior discrimination by the employer.

II.

EXECUTIVE ORDER NO. 11246 MANDATES RACIAL QUOTAS IN THE ABSENCE OF ANY SHOWING OF SPECIFIC PRIOR HIRING OR PROMOTION DISCRIMINATION AND IS CONSONANT WITH TITLE VII

A. Executive Order No. 11246 Mandates Racial Quotas Without a Showing of Specific Prior Hiring or Promotion Discrimination

Appellants correctly contend that the Kaiser Plan is also sanctioned by Executive Order No. 11246, as amended, and regulations issued by the Office of Federal Contract Compliance mandating affirmative action by all government contractors.

Executive Order No. 11246, mandating affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (1971).

The Fifth Circuit concluded that "If Executive Order No. 11246 mandates a racial quota for admission to on-the-job training by Kaiser, in the absence of any prior hiring or promotion discrimination, the Executive Order must fall before this direct congressional prohibition." This conclusion is in error because the case law and settled practice make clear that Executive Order No. 11246 mandates and encourages racial quotas in programmatic affirmative action activities, without a finding of past racial discrimination.

Executive Order No. 11246, as amended, is the government's announcement that it will not do business with any employers who discriminate against any employee or applicant on the basis of race, color, religion, sex or national origin.

By this Order, employers are required to take affirmative steps to ensure that employees and applicants are not disparately treated on the basis of race, color, religion, sex, or national origin. EO 11246, § 5.01., 41 C.F.R. § 60-2.

> "The duty of affirmative action requires positive steps to achieve equal employment opportunity for members of minority groups. Such steps include, but are not limited to, employment, upgrading, recruitment, layoff, or termination, rates of pay, and selection for training and apprenticeships." Donegan, Charles, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity In The Construction Industry Or More Pie In The Sky?* 20 Kansas L. Rev. 195 (1972).

The Order, as amended, mandates the use of racial goals even absent a showing of specific, prior, employment discrimination. See, *Germann* v. *Kipp,* 14 FEP Cases 1197 (WD Mo., 1977); *Cramer* v. *Virginia Com-*

monwealth University, 415 F. Supp. 673 (ED Va., 1976). Employers are required to set goals and timetables and to engage in active recruitment of Blacks, minorities, and women to correct "under-utilization" in an existing workforce. See, *Germann* v. *Kipp, supra, Cramer* v. *Virginia, supra.*

B. Executive Order No. 11246 Mandating Racial Quotas in the Absence of Any Showing of Prior Specific Hiring or Promotion Discrimination is Consonant With Title VII

President Roosevelt, in 1941, issued the first in a series of executive orders designed to help combat employment discrimination by government contractors. Subsequent to the Civil Rights Act of 1964, Titles VI, 42 U.S.C. §§ 2000d *et. seq.,* and VII, 42 U.S.C. § 2000e *et. seq.,* President Johnson issued Executive Order No. 11246, governing nondiscrimination by government contractors. The order imposed special fair employment obligations on contractors with the federal government and contractors working on federally assisted projects.

Many questions were raised regarding the validity of Executive Order No. 11246 in the face of Title VII. In 1972 Title VII was revised and amended. In the process, the Executive Order Program was subjected to careful scrutiny and its affirmative action aspect received explicit congressional approval. *See, e.g.,* Hearings on H.R. 1746 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess., at 79, 81-82, 84-85 (statement of W.H. Brown, EEOC Chairman).

In the instant case the Fifth Circuit stated that Executive Orders may not override contradictory con-

gressional expressions. However, it failed to state what contradictory congressional expressions it had in mind.

Congress, as a result of its concern for the absence of Blacks in the American labor force, included § 703(j) in the Civil Rights Act of 1964, as amended, which states:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex or national origin employed . . . in comparison with the total number of percentage of [such] persons . . . in any . . . area, or in the available workforce in any . . . area."

Title VII did not require preferential treatment, nor did Congress intend it to. However, it did not state that preferential treatment was prohibited.

The most important show of congressional support for Executive Order No. 11246, occurred in 1969 where a faction of the Congress sought to amend appropriations for the "Philadelphia Plan," an affirmative action plan providing goals and timetables for minority construction contractors in the Philadelphia area.

At the time of the congressional attack the Comptroller General sought to encourage the Senate Subcommittee on Deficiencies and Supplementals to include a provision limiting the use of funds to finance any contract requiring a contractor or subcontractor

to meet, or make any effort to meet specified goals of minority group employees. The Committee accepted this suggestion and attached a rider to the bill that contained continuing resolutions for the Office of Economic Opportunity, the Department of Health, Education and Welfare, the Agency for International Development and the Department of Labor. *See,* Washington Post, Dec. 20, 1969, at A-1, col. 6. The rider provided:

> "No part of the funds appropriated or otherwise made available by this or any other act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement with the Comptroller General of the United States holds to be in contravention of any Federal Statute. 115 Cong. Rec. 40.013 (1960).

After vigorous debate in both Houses of Congress the rider was defeated and the "Philadelphia Plan" was saved. See, Schuwerk, Robert P., *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. of Chicago L.Rev. 4, 723 (1972).

The legislative history of Title VII indicates that Congress approved future executive action to implement the purpose of the legislation. Credence for this point is found in Congress' attempt to amend the Act prior to final passage. The first proposed amendment submitted by Senator Tower, provided, in substance, that Title VII was to be the exclusive federal remedy for discrimination in employment, eliminating the President's power to issue Executive Orders. That amendment was defeated which evidences congressional recognition and approval of the Executive Order program. The second proposal was the introduction of § 711(b) of the Civil Rights Act of 1964, which provided specific statutory authorization for an executive antidiscrimination program. In the Committee report on H.R. 7152, the majority argued that a statutory foundation for executive order would prevent repeal or change of the program by future presidents, and would endorse presidential action not founded upon any statutory grant of authority. The Committee struck a compromise between supporters and opponents of the legislation. Language in § 711(b) was deleted, but the existing power of the President was not affected. This action on the part of Congress did not limit the powers of the President. Therefore he could institute whatever new executive programs he thought appropriate.

In debates concerning the legality of the Philadelphia Plan, it has often been pointed out that Congress implicitly recognized the existence of the Executive Order Program, including affirmative action requirements and approved its continuation through its passage of the 1964 Civil Rights Act. *See* Jones, *The Bugaboo of Employment Quotas, supra*; Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan,* 56 Cornell L.J. 84 (1970); Note, *The Philadelphia Plan: Equal Employment in the Construction Trades,* 6 Colum J. L. & Soc. Prob. 187 (1970); DuBois, *The Legality of the "Revised" Philadelphia Plan,* 30 Md. L. Rev. 114 (1970); Bickant, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts,* 44 N.Y.U.L. Rev. 590 (1969); Hardgrove, *The Philadelphia Plan,* 45 Notre Dame Law, 678 (1970); Krakower, *The Constitutionality of "Affirmative Action" to Integrate Construction Trades: The Philadelphia Plan,* 43 Temp. L.Q. 329 (1970); Comment, *The Philadelphia Plan and Strict Racial Quotas in Federal Con-*

tracts, 17 U.C.L.A. L. Rev. 817 (1970). Persuasive support for executive action to end employment discrimination can be found in 42 Op. Atty's Gen. 592 (1961) (on the legal authority for Exec. Order No. 10,925), and Solicitor of Labor, Legal Memorandum, Authority under Exec. Order No. 11,246 in Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255 (1969).

Congress reviewed the program that the executive branch had instituted to cope with employment discrimination by federal contractors and specifically rejected efforts to eliminate it or to authorize its expansion. The defeat of this Congressional rider gave new impetus to the OFCC programs. As of October, 1971, forty four metropolitan areas were operating under some variety of OFCC programs, and plans were under study for fifty-six more regions. Hearings on S. 2515, S. 2617, and H.R. 1746 Before the Subcomm. on Labor Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., at 78 (1971) (statement on L.H. Silberman, Under Secretary of Labor).

Several of the plans that had been instituted under Executive Order 11246 were challenged in courts, while revisions of the program were being made. In each instance, the court sustained the executive's actions, holding that the relevant federal or state executive order constituted independent legal authority for imposing affirmative action requirements, whether or not such relief would have been available in suits brought under Title VII. *Joyce* v. *McCrane,* 320 F.Supp. 1284 (1970). *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (1971). *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 686 (7th Cir. 1972). *Associated General Contractors of*

Massachusetts, Inc. v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973).

In *Contractors Association* v. *Secretary of Labor, supra,* the 3rd Circuit upheld the Philadelphia Plan. The Court decided that executive authority in the fair employment area had been accepted by Congress as a power distinct from its own, and that, therefore, the Philadelphia Plan fell into what Mr. Justice Jackson called the "zone of twilight" in which "Congressional inertia, indifference or acquiescence may . . . enable, if not invite, measures on independent Presidential responsibility." *See Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) concurring opinion of Mr. Justice Jackson.

In mid 1971, Congress undertook an evaluation of the impact of Title VII and the related Executive Order Program on the problems of employment discrimination in the debates leading to the 1972 Amendments to Title VII. At that time, the issue of whether 11246 was in conflict with VII, was clearly raised when Congressman Dent offered an amendment by way of substitute to H.R. 1746, the main bill introduced in the House. The Dent amendment was defeated, evidencing the Congress' acceptance of goals and timetables in anti-discrimination programs. The Senate also defeated a series of four major battles attacking the Executive Order mandate of affirmative action.

The Senate also defeated a measure that in effect would have transferred the enforcement of the Executive Order from the Department of Labor to the Equal Employment Opportunity Commission. The provision stated:

> "The rights of minorities and women are too important to continue this important function in an

> agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. It should have a chance to operate in a fresh atmosphere with an agency that has Equal Employment Opportunities as its sole priority." S. Rep. No. 92-415, at 30-3.

An amendment to strike the aforementioned provision was later introduced by Senator Saxbe. He argued that the affirmative remedies of the Executive Order gave "the promise of equal employment opportunity a new credibility" 118 Cong. Rec. at 1385. Throughout the debate the Third Circuit's opinion in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra,* was referred to. 117 Cong. Rec. at 31963, 31975; 118 Cong. Rec. at 1671. Senator Saxbe's amendment read:

> "The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required. 118 Cong. Rec. at 1398.

The Senate adopted Senator Saxbe's amendment.

Senator Ervin introduced a final amendment in an effort to have the Senate pass upon the legality of the Philadelphia Plan without being influenced by any extraneous considerations. This attempt would amend section 703(j) to proscribe all of the OFCC's affirmation action programs, by extending section 703(j) to

cover explicit remedies devised by the Executive Order. The amendment provided:

> "Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of imbalance, which may exist with respect to the total number or percentage or persons of any race, color, religion, sex, or national origin employed . . . . in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any committee, State, section, or other area. S.2275 (daily ed. Feb. 22, 1972).

The Senate by a decisive margin, two-to-one, rejected this final effort to alter the mandate of the OFCC program. Thus the affirmative remedies of goals and timetables was given Congressional sanction.

The court below erred in concluding that the Executive Order was in conflict with Title VII.

III.

THE VOLUNTARY ACTION BY THE EMPLOYER AND THE UNION IN ADOPTING THE PLAN SHOULD BE ENCOURAGED AND PROMOTED

The EEOC has articulated the role of voluntary affirmative action in its Guidelines. Under EEOC Guidelines, where an employer analyzes his employment practices, or a governmental agency charged with

the responsibility of analyzing an employer's workforce, does so, and finds reason to believe that based on past employment practices, there is an absence of Blacks or minorities in its workforce, or that these employees are locked into the lowest paying jobs or the lowest level of seniority, affirmative steps are to be taken to "make whole" these individuals. 29 C.F.R. Part 1608, BNA (D.L.R. 238, E-1).

While the EEOC Guidelines are not administrative "regulations", they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently are "entitled to great deference." *Albemarle Paper Company* v. *Moody, supra* at 417 (1975). See also, *Griggs* v. *Duke Power Company, supra, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973). 414 U.S. 86, 94.

Under the Guidelines an employer may implement affirmative action plans without proving that he has violated federal law whereas in the case at bar, the employer has reason to believe that his employment practices are either discriminatory or maintain the status quo.

This standard was adopted because it was realized that, as a practical matter, very few employers can be expected to prove that they actually discriminated against a class of their employees. To do so could result in the employers having to award backpay and other relief to the class members discriminated against, in order to put them in their rightful place. This standard would defer affirmative action and frustrate the intent of Title VII. *See Franks* v. *Bowman Transportation Co., supra.*

To realize the intent of Congress in enacting Title VII, employers who reasonably believe that they might be found to have discriminated on the basis of race, must be encouraged to take reasonable race-conscious corrective action. In the instant case it was reasonable for Kaiser to believe that it might be found to have discriminated. In a previous suit, *Parson* v. *Kaiser Aluminum,* 575 F.2d 1374 (1978), the Fifth Circuit found that Kaiser had discriminated in employment in its Chalmette plant. This finding was based on the fact that solely 3% of the craft jobs at that plant were filled by black employees, while there was 20% black representation plantwise. The statistics at the Gramercy plant were worse. In 1971 Kaiser had no blacks in its craft workforce out of a total of 250. By 1974 this number had increased only slightly. Still, less than 2% of the craft positions were filled by black employees. These factors, coupled with threats of the OFCC to take judicial action to force Kaiser to comply with affirmative action guidelines, gave Kaiser more than reasonable grounds to believe that it might be found to have discriminated on the basis of race. (16 FEP cases 2).

In the case at bar, the OFCC utilization study revealed an absence of black employees in the skilled crafts positions at Kaiser's Gramercy plant. Kaiser officials attributed this to the fact that the building trades were the training grounds of its skilled crafts positions and that discrimination in these trades was rampant. These findings, coupled with the fact that, perhaps more than in any other industry, the building and construction industry has excluded Blacks from its ranks,** led Kaiser and the steelworkers to enter

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** Jones, James, *The Bugaboo of Employment Quotas,* 1970 Wisconsin Law Review 340.

into a collective bargaining agreement in an attempt to eliminate the present effects of past discrimination in its workforce. This type of self-examination and the implementation of voluntary remedial steps reasonably calculated to rectify employment discrimination, where found, are the types of remedial measures envisioned by Congress when it enacted Title VII.

"Cooperation and voluntary compliance were selected as preferred means of achieving [the] . . . goal" *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 26 (1974), of assuring equal employment opportunities for all and erasing the relics and incidents of past discrimination.

In 1972, Title VII was amended to give the Equal Employment Opportunity Commission further authority, to ". . . . investigate individual charges of discrimination, *to promote voluntary compliance with the requirement of* Title VII, and to institute civil actions against employers or unions named in a discrimination charge." (Emphasis supplied), *Gardner-Denver, supra* at 44. The amendment was a reaffirmance of Congressional intent that employers use voluntarily imposed programs to eliminate present effects of past discrimination. Consistent with Congressional intent, the district courts have upheld voluntary compliance measures.

In *United* v. *Allegheny-Ludlam Industries, Inc.*, 517 F.2d 826, 846 (5th Cir., 1975), the court stated that voluntary compliance with Title VII is preferable. Said the court:

> ". . . it cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination suits." *See* also, *Allegheny-Ludlam, supra.*

Title VII and Executive Order 11246 mandate that employers, "self-examine and self-evaluate their employment practices and . . . endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." *Albemarle, supra* at 418. By urging employers to enter into voluntary consent agreements, Congress is allowing the employer to devise a plan which will comply with Title VII and disrupt the employment business as little as possible. *Cf. Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 98 S.Ct. 2943 (1978). Additionally, delay and expense are avoided.

In *United Jewish Organizations of Williamsburg* v. *Carey*, 430 U.S. 144, the court upheld the right of employers to voluntarily adopt race-conscious remedies to redress past discrimination. In *University of California Regents* v. *Bakke, supra,* this Court indicated, while not holding, that voluntary remedial programs to conform with Title VII are acceptable. It was correctly noted that:

> "In such cases, there has been detailed legislative consideration of various indicia of previous constitutional or statutory violations . . . and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and appropriate remedies." Bakke, *supra* at 33, n. 41.

The program adopted by Kaiser and the Union was reasonable. The Agreement had positive features: it removed the requirement of prior craft experience for on-the-job training and provided for recruitment of in-house personnel to be trained as craftsmen, rather than recruiting from the outside. The Agreement set a goal of achieving 39% black participation in the

skilled craft positions at Kaiser. This percentage was the same as the percentage of Blacks in the available labor force in the community where the plant was located. To achieve this goal, it implemented dual seniority lines: one black and one white, and established an entrance ratio of one black or minority worker to one white worker admitted to the on-the-job training program.

The Agreement between Kaiser and the steelworkers benefits both white and black employees at Kaiser. By removing the requirement of previous craft experience for on-the-job training, and recruiting in-house employees for the training, rather than skilled craft persons from outside the workforce, Kaiser's white employees received a dual benefit from the Agreement. The black employees benefitted by being afforded training experience and a seniority status which they had long been denied as the result of a pattern and practice of racial discrimination in the plant.

Added to these features is the fact that the Agreement was the result of collective-bargaining between Kaiser and the Union. Where the majority workers choose union representation and these representatives enter into an Agreement with the employer, that Agreement is binding on the minority. 29 U.S.C. § 157, 158 (a)(3). *See NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Accordingly, when Kaiser and the Union entered into the collective bargaining agreement here under attack, Weber became bound by that Agreement. To hold otherwise would be contrary to congressional intent:

> "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bar-

> gaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Campbell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 68 (1975).

Even where, as in this case, the employee seeks to bargain separately with his employer as to the elimination of employment practices which he feels peculiarly affect him, he should not be allowed to do so. *Id.* This is particularly the case when the Agreement which the employee challenges was designed specifically to remedy the present effects of past discrimination in an employer's workforce.

Each feature of the Agreement here challenged was reasonable and specifically designed to reach the balance between compliance with Title VII and fairness, which the Guidelines require. Any attack on the Agreement must, therefore, fail.

IV.

IF THIS COURT CONCLUDES THAT TITLE VII REQUIRES A SHOWING OF SPECIFIC PRIOR DISCRIMINATION SUCH A SHOWING WAS PRESENT IN THE INSTANT CASE

A. There Is Ample Evidence to Support a Prima Facie Showing of Discrimination Against Blacks at Kaiser

There was ample evidence to show prior discrimination against minorities at the Kaiser plant at Gramercy, Louisiana to support a *prima facie* showing by articulated Title VII standards. The Supreme Court noted in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) the appropriate standard in establishing a *prima facie* case of racial discrimination:

> "The complainant in a Title VII trial must carry the initial burden under the statute of estab-

> lishing a *prima facie* case of [illegal] discrimination [based upon certain characteristics]. This may be done by showing (i) that he belongs to a . . . minority [having such characteristics]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Once a *prima facie* case of discrimination is established, the plaintiff must show that facially neutral standards, in application, produced a significant and distinct discriminatory pattern.

Prior to the adoption of the 1974 Labor Agreement, Kaiser had hired personnel for its on-the-job craft training programs from outside the plant. The primary criterion for making the selection was prior craft experience. Up to 1974, the utilization of this selection criterion had resulted in the company employing five Blacks in craft positions, out of a total workforce of 290 craftsmen at its Gramercy facility. Thus, Blacks held less than 2% of the crafts positions in the plant. The prior experience requirement applied to all persons seeking positions in the on-the-job training program, but its obvious effect was to disproportionately reject black workers from participation in the program. The statistics regarding Blacks in the labor market and in Kaiser's workforce are telling here: 39% of the area workforce was black, and only 14.9% of Kaiser's workforce was black, an increase from around 10% in 1969.

The evidence adduced at trial that prior to 1969 the Company hired only "the best qualified, created a

strong inference that Kaiser had discriminated in the past by use of subjective and nonvalidated criteria which adversely affected minorities."

The Supreme Court has emphasized over and over again that a *prima facie* case of employment discrimination in violation of Title VII may be made out by showing that employment policies that are fair in form have a discriminatory impact on a Title VII protected class. *General Electric* v. *Gilbert,* 429 U.S. 125, 137 (1976); *Washington* v. *Davis,* 426 U.S. 229, 246-47 (1976); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody, supra* at 425; *McDonnell Douglas Corp.* v. *Green, supra.* Case law supports the contention that once an employment standard produces a discriminatory effect, the employer must rebut the inference of discrimination by proving that the hiring requirements are job related and "serve the employer's legitimate interest in 'efficient and trustworthy workmanship'." *Albemarle Paper Co.* v. *Moody, supra* at 425 quoting *McDonnell Douglas Corp.* v. *Green, supra* at 801. The district court did not require and the defendants did not produce any evidence in rebuttal. This was clearly in error. Had the court required Kaiser to present such a showing, past discrimination would have been identified and supported by the past exclusion of minorities from on-the-job training programs.

The Supreme Court has repeatedly found that a significant statistical showing of minority employees compared with their percentage in the relevant labor market is in itself sufficient to establish a *prima facie* case for a Title VII violation. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), *Hazelwood School District* v. *United States,* 433 U.S.

—— (1977), *Dothard* v. *Rawlinson, supra.* There is also ample case law within the circuits supporting this point of view. *Wade* v. *Mississippi Cooperation Extension Service,* 528 F.2d 508, 518-17 (5 Cir. 1976); *United States* v. *Hayes International Corp.,* 457 F.2d 112, 120 (5th Cir. 1972); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 225 (5th Cir. 1974); *United States* v. *Chesapeake and Ohio Ry.,* 471 F.2d 582, 587 and N.7 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543, 549 (4th Cir. 1975); *Parham* v. *Southwestern Bell Tele. Co.,* 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

Thus, we submit that the court below should have followed this standard and accorded weight to the statistical evidence identifying discrimination as articulated in *International Brotherhood of Teamster* v. *United States,*

> "[O]ur cases make it unmistakably clear that '[s]tatistical analysis have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620. See also *McDonnell Douglas Corp.* v. *Green, supra,* at 805. *Cf. Washington* v. *Davis,* 426 U.S. 229, 241-242. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases, see, e.g., *Turner* v. *Fouche,* 396 U.S. 346; *Hernandez* v. *Texas,* 347 U.S. 475; *Norris* v. *Alabama,* 294 U.S. 587. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See e.g., *Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 (CA5)." *Supra* at 339-340.

The statistics here not only warrant a strong inference that Blacks were discriminated against not only in terms of their representation in craft positions at Kaiser, compared to their representation in the company's workforce, but that they were also grossly underrepresented in the company's workforce as a whole, in comparison to their presence in the labor market area. The Supreme Court has repeatedly remarked that statistical showings of underrepresentation of minority group members is sufficient to establish a *prima facie* case of discrimination under Title VII. *International Brotherhood of Teamsters* v. *United States, supra* at 334-43 (1977); *Hazlewood School District* v. *United States, supra* at 307-311.

That these statistics should have given Kaiser even greater concern is evidenced by the fact that the same Fifth Circuit Court of Appeals, in a case involving another of Kaiser's Louisiana facilities, found that statistics reflecting that 3% of the craft workers were black, while 20% of the entire plant workers were black, constituted a *prima facie* showing of a Title VII violation. *Parson* v. *Kaiser Aluminum and Chemical Corp., supra* at 1390, n. 33.

We think the courts erred below in their future to consider, not only all of the facts before them, but what those facts actually meant. This is especially true in light of the fact that the real parties in interest here, those whose rights Title VII was primarily designed to protect, were not represented in this legisla-

tion, if for no other reason than to protect the equitable rights of Blacks. It is well settled that when federal courts sit to enforce federal rights, they have an obligation to apply federal equity principles. "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395 (1946).

B. The Voluntary Affirmative Action Plan Set Up by Kaiser Is Lawful Under Title VII

The Kaiser plant was well within the spirit and purpose of Title VII by creating two distinct lines of progression within the company's seniority system in order to correct the present effect of past discrimination as evidenced by the disproportionate statistics of minority employees.

After the passage of Title VII, investigations into allegations of discrimination revealed that what was done was the same for Blacks and Whites. Both groups were administered the *same* test, filled out the *same* applications, were required to obtain the *same* level of education as a pre-requisite for employment, were recruited for employment through the *same* system, and were subjected to the *same* loss of seniority rights when bidding on jobs in other departments. There was in other words no unequal treatment. However, Title VII case law has developed to the extent that even where the treatment is equal, the conduct may be illegal because of the consequences. The affirmative relief instituted by the Kaiser plant was an effort to correct a proved effect of discrimination—the low percentage of

black craftsmen at its plant, *Griggs* v. *Duke Power, supra.*

The record supports the fact that despite Kaiser efforts to increase its black workforce due to pressure from the federal government, the result was minuscule. Use of the same efforts to attract black craftsman produced unsuccessful results, only five out of the approximately 290 craftsmen at the plant were black. The union, also being an actionable defendant to a Title VII action was also subject to attack due to the low percent of minorities in the crafts. The union was justified in incorporating into its collective bargaining agreement, an affirmative remedial remedy.

> "The Griggs concept is bottomed on the 'consequences' or 'adverse effects' that challenged practices have on the employment opportunities of those protected by the Act. It is a broad concept that encompasses the following results: First, the present and/or continuing effects after July 2, 1965, at past discriminatory practices; secondly, present effects of present discriminatory practices even though no history of past discriminatory practices has been or can be demonstrated; and thirdly, present and past employment practices that have an adverse effect even if occasioned by benevolent motives, such as reliance on state protective legislation for women." See Belton, Robert. *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development,* 20 St. Louis Univ. L. J. 225, 245, 246 (1976).

Thus, had Kaiser not acted to correct the identified imbalance in its workforce, it would have been presumptively liable under Title VII. The voluntary nature of the company's act was a safeguard to avoid multiplicity of litigation.

The plant's selection criteria, which provided for a one-to-one hiring ratio implemented on the basis of racial seniority, is a proper remedial remedy to achieve a nondiscriminatory hiring goal. There was no intentional discrimination against the respondent, *Weber,* because the net effect did not create a clear and distinct nexus to intentional discrimination inspired by a neutral element of prejudice. Further, Kaiser's action in supporting racial minorities was not supported by an exclusionary motive. The statistics support the proposition that members of the majority race did not need a preference to matriculate in the system for there was a substantial number employed. This proposition is proven by the disproportionately high number of white employees at the plant.

The legislative purpose of Title VII was "to assure equality of employment opportunities and to eliminate those devices and discriminatory practices which have fostered racially stratified job environment to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green, supra* at 800. To effectuate this purpose, Congress proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Co., supra.*

> "[A] milestone in the efforts to end discrimination in employment in the private sector was reached on July 2, 1965, when Title VII of the Civil Rights Act of 1964 became effective. The enactment of Title VII was a recognition by Congress of the evils of wide-spread and pervasive discriminatory practices in employment and an attempt to provide a remedy. The promise of the efficacy of the Act as a means to eliminate employment discrimination was, as Judge Gewin observed in *Miller* v. *International Paper Co.,* 408 F.2d 283, 294 (5th Cir. 1969); 'like a distant star over a swamp of uncertainty and perhaps of depair."

> The efforts to eliminate employment discrimination in the private sector during the past decade can be characterized as successful only if the progress and developments are compared, for example, to the long and largely inconclusive efforts to end discrimination in public education. In contrast to both are efforts to eliminate discrimination in places of public accommodations under Title II of the Civil Rights Act of 1965, which resulted in substantial success after only a few years of litigation. Optimism for future progress under fair employment laws can be expressed only because of the recent judicial and legislative perception of the causes and consequences of discrimination based upon one's race, sex, religion, or national origin."
>
> See Belton, Robert, *supra* p. 305.

We respectfully suggest that the court below should have reached the conclusion that the Kaiser plan was reasonable and comported with the intendment of Title VII.

CONCLUSION

The Amici respectfully urge this Court to reaffirm the fundamental holding of *Bakke* and reverse the judgment below. We feel compelled to suggest to this Court the urgency and the necessity for a strong forthright pronouncement to bring to full fruition the intendment of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). The future health and welfare of this nation, both domestically and internationally, dictate that there must be no judicial retreat on the constitutional mandate that equality and freedom must be meaningful concepts for all people of our country.

Respectfully submitted,

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APPENDIX A

APPENDIX "A"

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Updated: January 15, 1979

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,
v.
BRIAN F. WEBER, ET AL.,
Respondents,

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent,

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.
BRIAN F. WEBER, ET AL.,
Respondents,

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INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Our extensive litigation program against employment discrimination is conducted through our privately funded Government Employment Project (providing representation to federal, state, and local government employees claiming unlawful employment discrimination), through our Equal Opportunity Employment Project (which provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi and Washington offices and other local affiliates. In this case, Kaiser and the USWA have sought through voluntary action to come to terms with the gross underrepresentation of minorities in the skilled crafts in Kaiser's plants by providing for access to a newly created training program by white and black workers on a one-for-one basis. If the attack on this system is successful, we believe, as Judge Wisdom said in his dissent, that the ultimate effect will be the end of voluntary compliance with Title VII. 563 F.2d at 230.

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* The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

We have previously addressed the issue of race-conscious affirmative action programs, in the context of higher education, in our *amicus* briefs filed in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), and *Regents of the University of California* v. *Bakke*, 57 L.Ed.2d 750 (1978). Because the issues presented by this case are vitally important to the realization of the goal of equal employment opportunity for blacks, the Committee files this brief urging reversal of the judgment below.

INTRODUCTORY STATEMENT

The agreement reached by Kaiser and the United Steelworkers of America (USWA) in this case was taken as a "'remedial' measure in response to pending litigation concerning minority and female employment"[1] and in response to threats by the Office of Federal Contract Compliance (OFCC) concerning Kaiser's affirmative action obligations. The agreement called for the establishment of training programs at Kaiser's 15 plants to train current employees for crafts positions. At the time the agreement was consummated in 1974, Kaiser's plant at Gramercy, Louisiana was approximately 85% white and 14.8% black. Black representation in the crafts was only 2-2.5%. Because the area from which the work force was hired was about 40% black in population, a goal of 39% minority representation was established for each of the crafts families.

[1] The court of appeals' statement that the collective bargaining agreement was entered into to avoid *future* litigation, 563 F.2d at 218, is wrong. Supplemental Agreement to Collective Bargaining Agreement, Art. IX ¶ 1 (Feb. 1, 1974). *See* Complaint ¶ 5 and Answers of Kaiser and USWA ¶ 5. At the time of the agreement, Kaiser was defending Title VII litigation involving its two other plants in Louisiana located at Chalmette and Baton Rouge. *Parson* v. *Kaiser Alum. & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978); *Burrell* v. *Kaiser Alum. & Chem. Corp.*, Civ. Action 67-86 (M.D. La.) (consent decree, Feb. 24, 1975).

Entrance into the training program depended almost exclusively on seniority, but since there were far more whites with greater seniority than blacks, without some equalizing mechanism, few blacks if any would have gained entrance into the program. Since this would have defeated the whole purpose of the program, the parties agreed in a Memorandum of Understanding that vacancies would be filled by selecting the white and black applicants with the greatest seniority on a one-to-one basis. The court of appeals held that this two-track system violates Title VII.

This Court's decision in *Bakke* teaches that, in determining the validity of race-conscious affirmative action programs, important distinctions must be drawn based on the statutes involved and the context of the particular case. The parties to this action disagree as to the scope of the question presented. We suggest that the narrow issue before the Court is whether Executive Order 11246 and its implementing regulations authorize government contractors to implement race-conscious affirmative action programs, involving quotas when necessary, to increase minority representation in the skilled trades, and, if so, whether the Executive Order conflicts with Title VII or is otherwise invalid.

The nub of the court of appeals' ruling is that, because past discrimination at the Gramercy plant was not proven, the "remedial" program devised by Kaiser and the USWA became a "racial preference" in violation of Title VII which even a court could not have ordered. 563 F.2d at 224. This holding utterly ignores the most singular aspect of this litigation—that none of the parties involved had the slightest interest in establishing the existence of past discrimination. It blinks reality to apply the same standards applicable to other Title VII litigation to this set of circumstances. The law must be flexible enough to devise standards that are meaningful so as not to result in self-

fulfilling prophesies concerning proof of issues concerning which the parties lack adversity.[3]

The purpose of this brief is to suggest a framework for analysis for determining the validity of racial quotas in cases such as this. Whatever standard is adopted should further the clear Congressional purpose of facilitating voluntary compliance in assuring equality of employment opportunity. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

We propose the following standard: a race-conscious affirmative action plan should be immunized by Executive Order 11246 from violating Title VII if a government contractor shows *either* (1) a reasonable belief that a *prima facie* case of racial discrimination against blacks can be established, *or* (2) a reasonable belief that part of his work force underutilizes minorities and women and that, unless corrective action is taken, he may be subject to sanctions by the OFCC. If either of these is met, then

[3] The only witnesses to testify at trial were two white workers and two Kaiser officials. The USWA put on no witnesses. Considering that neither party could benefit by a showing that past racial discrimination had occurred, it is remarkable that the record contains as much information as it does. *Amicus* believes that the statistical evidence before the Court in fact constitutes a *prima facie* case of racial discrimination. On this record we believe it unnecessary for the Court to determine the minimum threshhold of evidence required to permit a federal contractor to implement an affirmative action plan of the Kaiser design to claim the protection of Executive Order 11246.

We believe that the "two-court" rule should not be applied in this case because there was "obvious and exceptional" error in the lower courts' assessment of the facts concerning prior discrimination. *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). This error is exemplified by the court of appeals' treatment of discrimination in the limited training program in effect until 1974 as *de minimis;* in its failure to mention the five years' experience requirement previously used to hire craftsmen; and in its failure to consider 1970 census data showing that blacks accounted for 21.3% of the craftsmen, foremen, and kindred workers in the two parishes from which Kaiser drew its work force.

the contractor must show that the means chosen to increase the number of minorities in the work force is the least onerous alternative available. If he meets this burden, then the contractor is immune from liability under Title VII.[4]

SUMMARY OF ARGUMENT

I.

1. Executive Order 11246 exempts a government contractor from liability under Title VII when he implements a race conscious affirmative action plan designed to increase minority representation in the skilled crafts which have historically excluded blacks. The Executive Order permits the use of quotas and the legislative history of the 1972 amendments to the Civil Rights Act of 1964 demonstrates conclusively that Congress was aware of, and approved, the use of preferential treatment, including quotas, under the Executive Order.

2. Past discrimination need not be shown in order for a government contractor to qualify for the exemption. It

[4] If a race-conscious affirmative action plan were attacked by a white employee, at trial the contractor would establish his immunity under Executive Order 11246 by proving the required elements as described in the text. Once these elements were established, he would be entitled to a dismissal of the complaint. He need not establish a compelling need for the program, for as we argue, *infra*, the Executive Order itself shows a compelling governmental interest in affirmative action by government contractors.

Since non-government contractors are not covered by Executive Order 11246, their burden would be different. Obviously, the second part of our suggested standard—underutilization of minorities—would not apply: a non-government contractor is not aided by the powerful government interests underlying the Executive Order that all share equally in the jobs generated by the federal government's spending. As a defense to a Title VII suit, a non-government contractor must show some link to past discrimination in his plant to justify an affirmative action plan. A reasonable belief that a *prima facie* case of racial discrimination against blacks could be established should be sufficient.

is sufficient that he have a reasonable belief in the existence of a *prima facie* case of racial discrimination or that he is out of compliance with OFCC requirements concerning minority representation, and that the means chosen are the least restrictive alternative available. The record in this case amply demonstrates that Kaiser's program meets that standard.

II.

Because the Executive Order throws a mantle of protection over government contractors in creating race conscious affirmative action programs, it must be shown to be a valid exercise of Executive authority, and, in addition, to comply with equal protection principles of the Fifth Amendment. We assume, *arguendo*, that the most exacting judicial scrutiny is required. Executive Order 11246 and its predecessors have repeatedly been upheld as a valid exercise of the Executive power and the 1972 amendments to the Civil Rights Act of 1964 show Congress' express ratification of the federal contract compliance program including the use of quotas. The governmental interest that minorities not be excluded from jobs created by federal expenditures is compelling and the quota system used by Kaiser to admit blacks to the skilled crafts is necessary to promote this interest.

ARGUMENT

I. FEDERAL CONTRACTORS ARE IMMUNE FROM LIABILITY UNDER TITLE VII WHEN THEY CREATE AFFIRMATIVE ACTION PROGRAMS TO MEET THEIR OBLIGATIONS UNDER EXECUTIVE ORDER 11246.

(1) Executive Order 11246.

In 1941, President Roosevelt, at the behest of civil rights forces, issued the first in a series of Executive Orders designed to put an end to employment discrimination by government contractors. Executive Order 8802, June 25, 1941, 6 Fed. Reg. 3109 (June 1941), U.S. Code Cong. Service 1941, p. 860. For 20 years, a succession of Executive Orders carried forward the policy of nondiscrimination in government procurement and in the defense industry.[4] After 1943, the Executive Orders required all government contracts to include a clause obligating employers not to discriminate on the basis of race, color, creed, or national origin. Due to the ineffectiveness of this approach, in 1961 President Kennedy extended this requirement to include affirmative action. Executive Order 10925, 26 Fed. Reg. 1977, 3 C.F.R. 1959-63 Comp. 448. The obligations of governmental contractors are currently set forth in Executive Order 11246.[5] The Executive Order has been upheld as a "valid

[4] The successive Executive Orders are described in *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159, 168-70 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). *See also*, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 725 n.25 (1972).

[5] Executive Order 11246 provides, in pertinent part:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. § 202(1).

effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII." *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 175 (3rd Cir. 1977), cert. denied, 98 S.Ct. 3145 (1978).

Without any consideration of the legislative history, the court of appeals in this case held that Executive Order 11246, insofar as it mandates racial quotas for admission to on-the-job training programs, cannot be harmonized with § 703(d) of Title VII and is therefore invalid. An examination of the legislative history of the 1972 amendments to the Civil Rights Act of 1964 demonstrates that the Congress (1) knew that the Executive Order mandated the use of quotas, and (2) did not regard the Executive Order as being in conflict with the terms of Title VII.

(a) *Congress knew that Executive Order 11246 expressly provided for the use of quotas to ensure that blacks were not excluded from jobs created by the expenditure of federal funds.*

It is clear from the legislative history of the 1972 amendments that Congress was fully aware that quotas—in the strict sense of the word—were mandated by the Executive Order. One of the major procedural questions which the Congress addressed was whether to transfer all the authority, functions, and responsibilities of the Secretary of Labor pursuant to the Executive Order relating to contract compliance to the Equal Employment Opportunity Commission. Section 717(f) of H.R. 1746, P.L. 92-261. A major issue that emerged in the debates was whether, if the amendment were approved, Title VII would prohibit affirmative action, including the use of racial quotas, which was authorized by the Executive Order. Much of the discussion in the debates focused on the Philadelphia plan, whereby the OFCC had imposed affirmative action requirements utilizing goals for hiring

minorities as a precondition for federal assistance for certain construction projects.[6]

In opposing the transfer of the OFCC's functions to the EEOC, Rep. Green expressed her concern that, if the transfer occurred, the EEOC might decide that it had authority to impose racial quotas, which it was forbidden to do by Title VII. Her understanding of Title VII was that "[u]nder Title VII, (Sec. 703(j)) EEOC is expressly prohibited from imposing racial quota requirements. Under the Executive Order, there is authority to require an affirmative action plan including the imposition of racial quotas." She regarded "the Philadelphia Plan [as] such a quota plan." H. Rep. 92-238, 92nd Cong. 1st Sess. 68 (1971) (Separate views of Rep. Green of Oregon).[7]

To ensure that the EEOC would not misinterpret the extent of its authority in the event that the federal contract compliance program was transferred to its jurisdiction, Rep. Dent introduced an amendment that defined

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[6] In 1969, a preliminary skirmish had been fought over the quota issue. The Comptroller General objected to the Philadelphia plan as violating Title VII because it approved quotas. He refused to approve expenditures for projects approved under it. The Attorney General issued a contrary opinion and directed the Secretary of Labor to administer the plan. The Comptroller General then sought to have a rider attached to a pending appropriations bill to limit "the use of funds to finance any contract requiring a contractor or subcontractor to meet, or to make every effort to meet, specified goals of minority group employees." 115 Cong. Rec. 40,018 - 40,019 (1971). The rider, known as the Fannin rider, was defeated. The episode is described in 39 U.Chi.L.Rev., *supra*, at 747-50. As the comment points out, because the measure was a rider attached to an appropriations bill, it would be overstating the case to regard this as ratification by Congress of the Philadelphia Plan. No such ambiguity attends the debates on the 1972 Amendments.

[7] Reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (hereafter *Legislative History*), at 128. Rep. Green had submitted an amendment in committee which would have made Title VII take precedence in case of conflict. That amendment had been rejected.

the EEOC's powers in enforcing the Executive Order. His amendment would have prohibited the Commission from imposing or requiring quotas or preferential treatment in the administration of the federal contract compliance program.[8] *Legislative History* 190. He explained that:

> Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.

Legislative History 190.

Rep. Quie, in discussing the transfer of power to the EEOC, emphasized that "the OFCC does not operate under the provisions of the Civil Rights Act and its procedures and sanctions are completely different from those of the Act, . . ." *Legislative History* 202. He anticipated great difficulties arising "from the fact that the OFCC has imposed requirements on Federal Government contractors which it is questionable may be imposed under the statute." *Id.*

Rep. Green stated that Title VII "had always prohibited the establishment of quotas", *Legislative History* 209, but that "Executive Order 11246 under which the Philadelphia Plan was put into effect, in my judgment clearly did establish quotas." *Legislative History* 210. She then stated that it would be impossible for her to support the committee bill without some amendments, including a "Congressional prohibition against establishing any quota system—a prohibition against preferential treatment for some at the expense of others, a prohibition against 'reverse discrimination', if you will." *Ibid.* After describing how the OFCC had, in a highhanded manner, imposed quotas in a plant in Portland, she then stated that the purpose of the amendment was

> to give this House the right to decide whether or not we want to amend the Civil Rights Act and to say whether we are going to establish quotas by law. H.R. 1746, the committee bill, on page 29, freezes Executive Order 11246 into the law. If this were passed without amendment, we would be giving our approval to the quota system.

Legislative History 210, 211.

In an exchange between Rep. Pucinski and Rep. Dent, the latter made clear that in his mind there was no distinction between the word "goal" and the word "quota" and that under his amendment any preferential treatment, including quotas, would be forbidden:

> Mr. Pucinski. And, this amendment would bring Title VII into this Commission's activities? In other words, if this amendment is adopted, the Commission cannot claim it as exempt from Title VII of the Civil Rights Act nor can the Commission require quotas or goals in assigning job distribution?
> Mr. Dent. Right; it cannot require quotas.

Legislative History 235.

As a final example, Rep. Steiger stated that he was "absolutely appalled" at the Dent amendment, "which is aimed at subverting the Philadelphia plan and the Office of Federal Contract Compliance's effort to carry forward an affirmative action program." *Legislative History* 222. He went on to say, with particular relevance for this case:

[8] The amendment read:

> The Commission shall be prohibited from imposing or requiring a quote [sic] or preferential treatment with respect to numbers of employees, or percentages of employees of any race, color, religion, sex or national origin. *Legislative History* 189.

> I think an effort has been made to end the other program [i.e., the federal contract compliance program] designed to ensure an increase in the abiilty of the minority people to gain some place in those trades in which the salaries are high and in which they have a certain opportunity to be *skilled craftsmen* in the society. *Ibid.* (Brackets and emphasis added.)

The Dent amendment was defeated. 117 Cong. Rec. H. 8540 (daily ed. Sept. 16, 1971).

This is but a small sampling of statements made during the debate in the House and Senate demonstrating that Congress understood that the Executive Order authorized affirmative action, including quotas, and that Title VII did not in the absence of prior discrimination.[9]

(b) *Congress did not regard the Executive Order as conflicting with Title VII.*

The Senate was also fully informed as to the remedial differences between Executive Order 11246 and Title VII. Sen. Javits explained how the OFCC had interpreted the concept of affirmative action "as something more than just the duty not to engage in active discrimination in hiring." *Legislative History* 648.

> Under this concept of affirmative action OFCC has been able to promulgate plans, such as the Philadelphia plan, and numerous similar plans in other cities throughout the country, under which contractors agree to undertake good faith efforts to increase the utilization of minority group employees and women *without reference to whether they are actually guilty of illegal discrimination. Ibid.* (emphasis added)

[9] The relevant debates in the House appear in *Legislative History*, pp. 128, 209-211, 260-261, 287 (remarks of Rep. Green); 190, 255, 234-235 (remarks of Rep. Dent); 202 (remarks of Rep. Quie); 208-209, 230-231, 283-34 (remarks of Rep. Erlenborn); 208-209 (remarks of Rep. Hawkins); 222, 224 (remarks of Rep. Steiger); 234-235 (remarks of Rep. Pucinski); and 259 (remarks of Rep. Gerald R. Ford).

In the Senate, the relevant debate is found at: 515 (remarks of Sen. Allen); 648-649, 1046-1048 (remarks of Sen. Javits); 915-917 (remarks of Sen. Saxbe); 921 (remarks of Sen. Williams); and 1042-1045, 1101, 1714-1717 (remarks of Sen. Ervin).

He went on to point out that Title VII "is strictly a nondiscrimination law. Affirmative action may be ordered, but only as a remedy in a case of proven discrimination." *Legislative History* 649. He continued that, if OFCC's powers were transferred to the EEOC, "[t]he result might be confusion in the agency and confusion in the minds of Federal contractors in dealing with the agency, or a watering down of the Executive Order program so that it and the Title VII program become indistinguishable." *Id.*

Sen. Saxbe gave emphasis to the point:

> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. *Proof of overt discrimination is not required.* (emphasis added)

Legislative History 915. In opposing the transfer of functions to the EEOC, Sen. Saxbe stated: "The affirmative action concept as innovatively and successfully employed by the OFCC has been challenged as a violation of Title VII—the courts have responded by stating that the Executive Order program is independent of Title VII and not subject to some of its more restrictive provisions." *Id.* 916. He foresaw that placing the Executive Order program under Title VII would give rise to renewed challenges. *Id.* 917.

The failure of the effort to merge the OFCC program into the EEOC was the prelude to a major battle in the

Senate—orchestrated by Senator Ervin—to subject the Executive Order to Title VII's anti-discrimination provisions and annihilate the affirmative action program. The conflict has been described in Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev., *supra*, at 754-757, and will not be repeated in depth here.

Briefly, an amendment offered by Sen. Ervin would have provided that: "No department, agency or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." 118 Cong. Rec. S. 691 (daily ed. Jan. 28, 1972). This amendment was decisively rejected. Because, in addition to attacking the Philadelphia Plan, the amendment could be read to deprive even courts of power to remedy proven cases of discrimination by quota relief, its defeat arguably is not a clear-cut statement of support for the Executive Order affirmative action program. Any uncertainty on this score was soon resolved.

Sen. Ervin introduced another amendment which would have amended § 703(j) of Title VII to proscribe completely the OFCC's affirmative action program.[10] This

[10] The amendment provided:

> Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

118 Cong. Rec. S. 2275 (daily ed., Feb. 27, 1972).

was to be accomplished by extending § 703(j) to cover explicit remedies devised under the Executive Order Program. In describing the amendment, Sen. Ervin said:

> Anyone who is desirous of understanding this amendment can read the amendment in the light of subsection (j) of § 703 of the Civil Rights Act of 1964 and understand what it would do. It is designed to make the prohibition upon preferential treatment created by this subsection of the original act applicable not only to the EEOC, but also to the Office of Contract Compliance and to every other executive department or agency engaged, either under the statute or under any Presidential directive, in enforcing the so-called equal employment opportunity statute.

Legislative History 1714. Sen. Javits responded by saying that it would make plans like the Philadelphia Plan unlawful and by including the Executive Order, preclude the federal government as an employer from putting such a plan into effect. *Legislative History* 1715. The amendment was decisively defeated. *Legislative History* 1716-17.

The rejection of this amendment conclusively demonstrates (1) that the affirmative action provisions of the Executive Order are neither governed by nor in conflict with § 703(j) of Title VII and[11] (2) that programs of preferential treatment, including quotas, are a permissible means of enforcing the Executive Order.

[11] The court of appeals held that the Executive Order conflicts with § 703(d) of the Civil Rights Act relating to admissions to on-the-job training. 563 F.2d at 227. There is absolutely nothing in the legislative history that suggests Congress intended to ratify the authority of the OFCC to implement affirmative action plans to the exclusion of on-the-job training programs.

(2) The Standard of Review for validating affirmative action programs established by government contractors to meet their obligations under Executive Order 11246.

While Executive Order 11246 exempts race-conscious affirmative action plans created to satisfy OFCC requirements, that does not mean that employers are without any constraints whatsoever in setting up such a plan. What is required is a standard that makes sense in the special context of the Executive Order.[12]

We believe that a government contractor who can demonstrate either a reasonable belief that a *prima facie* case of discrimination against blacks could be made out against him or that he might incur sanctions from the OFCC because of low utilization of minorities in his work force (or skilled crafts as here) should be able to create a race conscious AAP if he demonstrates that the particular plan adopted is necessary under the circumstances. This standard satisfies the policies underlying the Executive Order and protects the rights of white workers by requiring that the plan be carefully tailored.

Executive Order 11246 does not require proof of overt past discrimination to justify an affirmative action program—rather, it looks at the composition of the employer's work force. See *Legislative History* 648 (Remarks of Sen. Javits); 915 (remarks of Sen. Saxbe); 921 (remarks of Sen. Williams). *Cf. E.E.O.C.* v. *A.T.&T., supra* (consent decree denying violations). Under 41 C.F.R. 60-2.11, non-exempt employers must undertake a utilization analysis which must be filed with the OFCC.[13] A

[12] Judge Wisdom suggests in his dissent that, if an affirmative action program adopted in a collective bargaining agreement is a reasonable remedy for an arguable violation of Title VII, it should be upheld. 563 F.2d at 230.

[13] " 'Under-utilization' is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their avialability." 41 C.F.R. 60-2.11(b). Factors to be considered are:

[Footnote continued on page 17]

federal contractor who implements an affirmative action plan because minorities are under-utilized is motivated by the desire to protect all its employees against loss of jobs. If the company is "debarred" or incurs other sanctions, all employees, white and black, suffer. (Tr. 130). A reasonable program designed to prevent this from happening should be upheld.

Alternatively, as Judge Wisdom pointed out, an employer should not have to wait to be sued by black employees before taking affirmative action. If he has a reasonable belief that a *prima facie* case of liability could be established, this, too, should justify the creation of a reasonable program.[14]

In either case, the utilization analysis should provide the basis for determining whether the employer could form such a reasonable belief.

[13] [Continued]

(1) The minority population of the labor area surrounding the facility;

(2) The size of the minority unemployment force in the labor area surrounding the facility;

(3) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(4) The general availability of minorities having requisite skills in the immediate labor area;

(5) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(6) The availability of promotable and transferable minorities within the contractor's organization;

(7) The existence of training institutions capable of training persons in the requisite skills;

(8) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

[14] Of course, the existence of an OFCC agreement does not provide a company with a defense to a Title VII action which demonstrates that the AAP is ineffective and fails to eliminate present effects of past discrimination. *Swint* v. *Pullman-Standard*, 539 F.2d 77, 95 n.44 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975).

It is also appropriate, in the case of a government contractor, to impose a requirement that he demonstrate that his plan is necessary to the accomplishment of a legitimate and substantial governmental interest.[15]

(a) *Kaiser was justified in instituting a race conscious affirmative action plan under either the* prima facie *case standard or the "underutilization" standard.*

The record amply demonstrates that Kaiser agreed to the training program and the two-track seniority system at least in part to comply with threats by the OFCC conditioning federal contracts on appropriate affirmative action. 563 F.2d at 218. This in itself should justify the creation of an affirmative action plan to train minorities in the skilled crafts.

Furthermore, evidence introduced at trial and which is available as a matter of public record demonstrate that Kaiser could reasonably have believed that a *prima facie* case of past racial discrimination could have been established.

First, statistical evidence demonstrated a *prima facie* case of discrimination against blacks in hiring for unskilled jobs. The production force in 1974 was only 14.8% black as compared with the area work force of 39% black. Tr. 94-95. Even this figure was up sharply from 1969 when Kaiser began hiring on a one-to-one black-white ratio under pressure from the OFCC. From 1958 to 1969, Kaiser hired off the street on a "best qualified" basis. The disproportionately low number of blacks hired could have been the result of using "non-validated" tests or improperly subjective processes. Discrimination in these hires could naturally affect the ability of blacks to enter the training program instituted in 1974 because fewer blacks would have the necessary seniority to make them competitive with whites. 563 F.2d at 231.

Secondly, until 1974, Kaiser had a limited training program for two crafts: carpenter-painter and general repairman. (Tr. 101-102). Eligibility for these programs required experience as well as seniority. (Tr. 110) Out of 28 trainees in the two programs only two were black. Thus, with two exceptions, the prior experience requirement kept blacks out of the training program. (Tr. 135) Nothing in the record suggests that Kaiser attempted to recruit blacks for the training program. Its post-1970 recruiting of blacks—the only recruiting it ever undertook—extended only to blacks who were fully qualified craftsmen. (Tr. 99)

The court of appeals seems to acknowledge that, but for the small numbers involved, a *prima facie* case of discrimination was made out. The court concluded that, in view of the limited scope of the program, the prior experience requirement could not be regarded as an unlawful employment practice. 563 F.2d at 224 n.13. However, the size of the program does not immunize it. *Green* v. *McDonnell Douglas Corp.*, 411 U.S. 792 (1973). Indeed, in this very case the majority found Title VII violated because it gave preference to seven blacks.

Thirdly, Kaiser required five years' (subsequently reduced to three) experience to be hired into the "journey-

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[15] If the Executive Order exempts race conscious affirmative action plans from the operation of Title VII, the constitutionality of the Executive Order itself is called into question. In *Bakke*, Justices Brennan, Marshall, White and Blackmun held that racial classification designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives." 57 L. Ed. 2d at 814. Mr. Justice Powell held that a race conscious program must be subjected to the most exacting scrutiny under the Constitution. Since we believe that race conscious programs under the Executive Order serve a compelling governmental interest and that the particular plan used by Kaiser is the least restrictive alternative under the circumstances, we analyze the issue using the more rigorous standard of review. If Kaiser's program meets the standard applied to "suspect" classifications, *a fortiori* it would meet the "substantial relationship" test.

In Section II we take up the questions of whether the Executive Order is constitutional and whether affirmative action using quotas serves a compelling governmental interest.

man top paying standard rate craftsman classification" (Tr. 111). Prior to 1974, only five blacks were in all the crafts combined; two of the blacks had gone through the limited training program (Tr. 112). Until 1974, the company was unable to hire a black journeyman off the street (Tr. 112). There was no showing that the experience requirement was necessary and, indeed, the fact that it was shortened from five to three years suggests that it was not.

Fourth, Kaiser maintained that the reason more black craftsmen were not hired prior to 1974 (there were five out of 290 craft workers at the Gramercy plant) was due to the lack of black craftsmen in the area. Kaiser's industrial relations expert testified at trial that the great majority of all employees at the plant were hired from St. James and St. John the Baptist parishes. 415 F. Supp. at 764. And it was the population of these two parishes that was used to establish the goal of 39% minority for each of the craft families at the Gramercy plant. (Tr. 95).

Census figures show that in 1970, 432 of 2,029 or 21.3% of workers in those two parishes classified as Craftsmen, Foremen, and Kindred Workers, were black.[16]

[16] OCCUPATION OF EMPLOYED PERSONS
16 Years of Age and Over
1970

Craftsmen, Foremen, and Kindred Workers	Total	Black	Black %
Louisiana:	167,860	25,901	15.4%
New Orleans SMSA:	49,641	8,897	17.9%
Baton Rouge SMSA:	15,884	2,703	17.0%
St. James Parish:	783	179	22.9%
St. James and St. John the Baptist:	2,029	432	21.3%

Source: U.S. Bureau of the Census, Census of Population: 1970 General Social and Economic Characteristics, Louisiana.
State data: Table 54
SMSA data: Table 86 (totals)
Table 93 (blacks)
Parish data: Table 122 (totals)
Table 127 (blacks)

The black craft population at Gramercy was only 2-2.5% in 1974. 415 F. Supp. at 764.

Fifth, assuming the alleged lack of available black craftsmen was caused by discrimination by craft unions, and, as Kaiser claims, not by its own hiring policies,[17] the company's failure to institute a large-scale training program to reduce its dependency on so discriminatory a source of craftsmen, is itself a *prima facie* violation of Title VII. Because the requirement of prior experience tended to exclude blacks at such a high rate, it was unlawful unless justified by "business necessity". *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975). No such justification has been offered.

Finally, the two documents lodged with the clerk by the United States in this case demonstrate (1) that craft employment practices at the Gramercy plant were out of compliance with OFCC anti-discrimination requirements (1971 Compliance Report) and (2) that prior experience requirements for transfer to maintenance crafts were not validated and had been waived for whites but not for blacks.

(b) *The two-track seniority system used at the Gramercy plant was the least restrictive viable alternative.*

The problem confronted by Kaiser and the USWA was that as of 1974, of the 290 craftsmen at the Gramercy plant, only five, or approximately 2%, were black. The

[17] *But see Parson* v. *Kaiser Alum. & Chem. Corp., supra*, 575 F.2d at 1381-1382, 1389-1390. In a footnote, the court distinguished the *Weber* case with the statement that "Kaiser went too far . . . by imposing a hiring quota of a minimum number of blacks in a plant where no prior discrimination *could* be shown." 575 F.2d at 1374 n.35 (emphasis added). As discussed above, we consider it disingenuous to equate what the parties to that lawsuit were interested in showing and what might have been shown if their interests had been truly adverse on that particular issue.

two-track system based on seniority was not only reasonable under the circumstances, but was necessary if blacks were to have any real chance of being able to participate in the training program.

First, it cannot be argued in the present context that application of a quota in any way interferes with merit-based hiring. All the applicants were equally well qualified to participate in the training program. For all intents and purposes, the only measure of selection was seniority. (Tr. 105, 114)

Second, a Kaiser official testified that in the absence of a race conscious program "very few blacks . . . would get into any of the crafts for quite a while." (Tr. 113).

Third, unlike the situation in higher education, this would be an inappropriate situation to consider race as one of several relevant factors. Unlike a university, an industrial employer has no justifiable interest in a diverse work force. Selection for crafts training has traditionally been based on seniority under collective bargaining agreements.

Fourth, in view of the fact that Kaiser claims that it had exhausted the supply of skilled blacks in the area, the only way to increase minority representation in the crafts families was through the implementation of a training program.

Fifth, the system aided both whites and blacks because both groups had an opportunity to enter the crafts which they did not have previously.

Sixth, the quota agreed upon was not an absolute quota in the sense that it reserved all the spaces in the training program for blacks. *See Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir. 1971) (on petition for rehearing *en banc*), *cert. denied*, 406 U.S. 950 (1972).

Seventh, a lesser ratio such as 1 black to 2 whites would not have been effective. Even using the 1-1 hire ratio, it was estimated by a Kaiser official that it would take a minimum of 10 years to achieve the 39% figure and possibly never, depending upon Kaiser's needs and turnover. (Tr. 108-109).

Eighth, using a random sampling, given the racial composition of the labor force, would have produced few, if any, blacks.

Ninth, the 1-1 ratio was temporary. Under the agreement it was understood that once the goal of 39% was achieved, Kaiser would revert to the ratio needed to keep minority representation equal to the representation in the community work force population. (Tr. 109-110).

Given the particular facts of this case, the 50-50 hiring ratio for acceptance into the training program was the least restrictive viable alternative.

II. EXECUTIVE ORDER 11246 IS A VALID EXERCISE OF THE EXECUTIVE POWER WHICH SERVES COMPELLING GOVERNMENTAL INTERESTS.

(a) *Executive Order 11246 was issued pursuant to statutory authority and has the force and effect of law.*

The authority of the President to issue Executive Order 11246 and its predecessors has repeatedly been upheld. *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (NOPSI); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra; Farkas* v. *Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967) (Exec. Order 10925); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964) (Exec. Order 10925 and prior orders). The authorization has variously been found in Art. II of the Constitution, which commands the President

to "take care that the laws be faithfully executed", the due process clause of the Fifth Amendment, explicit Congressional authorization in 40 U.S.C. § 486(a), and implied Congressional ratification in Title VII of the Civil Rights Act of 1964 and the debates surrounding the 1972 amendments. Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1275-80 (1971); *United States* v. *New Orleans Public Service, Inc., supra.* In *NOPSI, supra,* the court isolated three sources of legislative authority for Executive Order 11246: the President's express statutory authority concerning federal procurement; the Civil Rights Act of 1964; and the debates over the 1972 amendments.

40 U.S.C. § 486(a) authorizes the President to issue orders to implement the Federal Property and Administrative Services Act of 1949. The procurement power may be used by the President and Congress to achieve social and economic objectives. *Rossetti Contracting Co.* v. *Brennan,* 508 F.2d 1039, 1045 n.18 (7th Cir. 1974); *Northeast Construction Co.* v. *Romney,* 157 U.S. App. D.C. 381, 485 F.2d 752, 760 (1973). As the Court said in *NOPSI, supra,* "Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order." 553 F.2d at 467.

Moreover, Congress has ratified the Executive Order program, including the use of quotas, to implement the affirmative action aspect. What was implicit in 1964 when Congress indicated that Title VII would not be the exclusive remedy for employment discrimination and permitted the Executive Order program to continue, was made explicit in 1972 when it turned back attempts to consolidate the OFCC with the EEOC and eliminate the use of quotas as a tool for achieving affirmative action

on the part of government contractors. *NOPSI, supra,* 553 F.2d at 467. Congress' action compels the conclusion that it intended the Executive Order program to continue and that it was concerned that the OFCC should continue to be the instrument for carrying out the Executive policy. Whatever doubts that may have existed concerning the validity of the Executive Power to implement the program were cured by Congress' action in 1972. 39 U.Chi. L.Rev., *supra,* at 723.

(b) *In authorizing racial quotas to increase minority representation in the skilled crafts, Executive Order 11246 serves a compelling governmental interest and does not violate the due process clause of the Fifth Amendment.*

Recognition of the fact that Executive Order 11246 permits Kaiser to use a racial quota to increase minority representation in the skilled crafts gives rise to the question of whether the Executive Order itself violates equal protection principles contained in the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). We assume that because Kaiser's two-track seniority system uses race as a factor, the governmental purpose must be both legitimate and substantial and that the program's racial classification must be necessary to promote this interest. *Regents of the University of California* v. *Bakke,* 57 L. Ed.2d at 781, 786 (Powell, J.); *In re Griffiths,* 413 U.S. 717 (1973).

During the Congressional debates on the 1972 amendments to the Civil Rights Act of 1964, Rep. Mink described the purpose of the Contract Compliance Program in the following terms:

> Government contractors are among the largest and most influential in the Nation and the policies and practices which they adopt have a significant impact on the rest of the business community. Through the Government-wide contract compliance program, the OFCC seeks to prevent any indirect Federal sub-

sidization of employment discrimination and to guarantee that the Government's tremendous purchasing power operates as a force for social improvement.

Legislative History 298. Plainly, the government's interest in seeing that minorities are not excluded from employment opportunities which are generated by the expenditure of vast amounts of federal funds is substantial.[18] This is particularly true in this case which concerns the exclusion of blacks from the skilled trades. It is well-documented that the absence of blacks from the crafts nationwide was caused by blatant racial discrimination.

Kaiser's program was designed to address a particular problem: the absence of blacks from the craft families in its plants. The problem is a pervasive one in American industry and has its roots in history. Even before the Civil War, skilled black workers were regarded as rivals by white working men in both the North and the South. R. Kruger, SIMPLE JUSTICE, 52 (Vintage ed. 1977).[19]

[18] Furthermore, the government is at the height of its power in requiring companies it does business with to help advance societal goals: the government has the unrestricted power to decide with whom it will deal and the terms and conditions of the agreement. NOPSI, *supra*, 553 F.2d at 469. *See also, Atkin* v. *Kansas*, 191 U.S. 207 (1903); *Lochner* v. *New York*, 198 U.S. 45, 55, 64 (1905); *Ellis* v. *United States*, 206 U.S. 246, 256 (1907); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-129 (1940); *United States* v. *Darby*, 312 U.S. 100, 115-116 (1941). While there are alternatives to Executive Order 11246 by which the Executive Branch may influence policy involving the expenditure of federal funds, each has significant limitations. 84 Harv.L.Rev., *supra*, at 1276-1277.

[19] Before the Civil War, there were numerous black craftsmen. Masters often hired out their slave craftsmen to others. E. Genovese, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE, 391 (1974). White craftsmen were hostile to free black craftsmen and attempted to drive them out of the professions. I. Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH, 229-232 (Vintage ed. 1976); E. Genovese, ROLL, JORDAN, ROLL, *op. cit. supra*, at 389 and sources cited in n.3. 41 C.F.R. 60-2.11 states that skilled crafts is one category in which minorities are likely to be underutilized.

After the war, tensions between workers of different races mounted. Northern workers resented blacks as competitors in the labor market and a depressant on wage levels: white Southern craftsmen feared competition from blacks who had been trained as slaves to be blacksmiths, bricklayers, or cabinet makers. *Id.* 52. Blacks were excluded from membership in the unions, beginning a pattern of hostility which was to last a hundred years. *See* R. Logan, THE BETRAYAL OF THE NEGRO, 147-162 (Collier ed. 1965). By World War II, "the most unrelenting practitioners of [racial] bias were the independent craft unions and affiliates of the American Federation of Labor, whose long standing antipathy to blacks never died." R. Kruger, SIMPLE JUSTICE at 228. A Kaiser official in this case testified that the lack of black skilled workers was "a direct result of employment discrimination over the years." (Tr. 142).

Discrimination against blacks in the trades was well entrenched by 1941 when, reacting to the threat of black leaders to commence massive demonstrations, President Roosevelt promulgated Executive Order No. 8802. 39 U. Chi. L. Rev., *supra*, at 725. The Executive Order, and those which followed, sought to ensure that jobs which were generated through expenditures of federal money would not be denied to some because of their race.

The court of appeals held that proof of past discrimination at the Gramercy plant was an essential precondition to upholding the validity of Kaiser's affirmative action program. 563 F.2d at 224. But judicial-type findings of fact of past discrimination are not required under Executive Order 11246.[20] As Sen. Williams, who

[20] Or, it appears, under the Constitution. In *Bakke*, this Court held that a race conscious affirmative action program would be valid if it meets exacting scrutiny under the equal protection clause of the fourteenth amendment. There was no evidence that the University of California medical school at Davis had ever practiced racial discrimination.

supported transferring the functions of the OFCC to the EEOC, said:

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort regardless of the past history of the employer to upgrade and improve its minority work force. In the affirmative action program, the concept of improving the quality of minority employment is commendable. It is necessary, and it is urgent. In the Department of Labor it has not worked well and should be transferred. The contract compliance program is necessary and important.

Legislative History 921. *See also Legislative History* 648 (remarks of Sen. Javits); 915 (remarks of Sen. Saxbe). *Cf. Rhode Island Chapter, Association of General Contractors* v. *Kreps*, 450 F. Supp. 338, 353-355 (D. R.I. 1978). Discrimination in the steel industry is well-documented.[21]

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[21] *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom. National Org. of Women* v. *United States* and *Harris* v. *Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944 (1976). Kaiser's two other plants in Louisiana have been the subject of successful lawsuits charging employment discrimination. *Parson* v. *Kaiser Aluminum & Chemical Corp., supra; Burrell* v. *Kaiser Aluminum & Chemical Corp., supra* (consent decree, Feb. 24, 1975). A Kaiser spokesmen testified at trial that no employer in the United States had been free from discrimination against blacks prior to a given time in history. (Tr. 169). While he did not know of specific instances of discrimination at Gramercy, it was not his responsibility to pursue it. (Tr. 168). In his opinion, the small statistical presence of minorities in the craft groups indicated that there had been discrimination in those groups. (Tr. 146). He testified that minorities had not been permitted to participate in certain skilled occupations and therefore they couldn't be available in any quantity in the marketplace. (Tr. 146). This was no different at any of the Kaiser facilities. (Tr. 147).

The constitutionality of racial quotas under Executive Order 11246 has been consistently upheld. *E.E.O.C.* v. *A.T.&T., supra*, 556 F.2d at 178-80; *Associated General Contractors of Massachusetts* v. *Altshuler*, 490 F.2d 9, 16-19 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*, 442 F.2d at 176. In requiring government contractors to take affirmative action, through the use of quotas if necessary, the Executive Order serves the substantial governmental interest of correcting the racial imbalance in the skilled crafts caused by historical discrimination. The remaining issue is whether the quota used is necessary to the accomplishment of this purpose, and, as we have demonstrated in Section I(2)(b), *supra*, on the particular facts of this case, it is.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
Nos. 78-432, 78-435, 78-436

No. 78-432

UNITED STEELWORKERS OF AMERICA,
Petitioner,

vs.

BRIAN F. WEBER,
Respondent.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORP.,
Petitioner,

vs.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES, *et al.*,
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vs.

BRIAN F. WEBER,
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Amicus Curiae Brief for and on Behalf of Petitioners by Women's Equal Rights Legal Defense and Education Fund (WERLDEF).

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TABLE OF AUTHORITIES CITED

Publications

International Women's Year Report, The Spirit of Houston, An Official Report to the President, the Congress and the People of the United States, March, 1978, p. 45 9

U.S. Dept. of Labor, Women's Bureau, 1969; Handbook on Women Workers, Bulletin 294 (Washington, D.C.: G.P.O. 1969) pp. 105-6 4

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Amicus Curiae Brief for and on Behalf of Petitioners by Women's Equal Rights Legal Defense and Education Fund (WERLDEF).

Introduction.

The Women's Equal Rights Legal Defense and Education Fund is a non-profit California corporation, designed to help bring women into the mainstream of American life by protecting and expanding their legal rights in such areas as employment, education and family law.

ARGUMENT.

I.
Need for Affirmative Action.

The continuation and expansion of Voluntary Affirmative Action Programs is absolutely essential if women are ever to achieve equality in the labor force.

Affirmative Action Programs are needed because women are not at the present time equal participants in the labor market. Affirmative action is a vehicle which, if encouraged, will enable women to attain economic equality. There is a real need for Affirmative Action because women in the United States today are still victims of occupational segregation (sex segregation in jobs). This restricts the employment opportunities open to women and results in lower earnings for women owing to the over-supply of labor available for women's jobs. In addition, it permits a low status to be accorded to women by society at large since predominately female occupations are generally regarded as less prestigious or important than other occupations.

II.
Occupational Segregation of Women.

Statistics gathered by the United States Department of Labor, Manpower Administration, prove that women are segregated by their sex in the lower-paying jobs

throughout the American economy. The statistics establish the following:

In 1971, almost 70% of male, white-collar workers, or 28% of all working men were in the professional and technical or managerial category, whereas only about 32% of female, white-collar workers or about 20% of all working women were in one of these categories. Nearly 56% of female, white-collar workers, or over 1/3 of all employed women were working at clerical jobs. (See Table 1)

Occupational Distribution of the Labor Force, by Sex, 1971.

Table shows the distribution of female and male workers by occupation in 1971.

Table 1:

TABLE Occupational Distribution of the Labor Force, by Sex, 1971

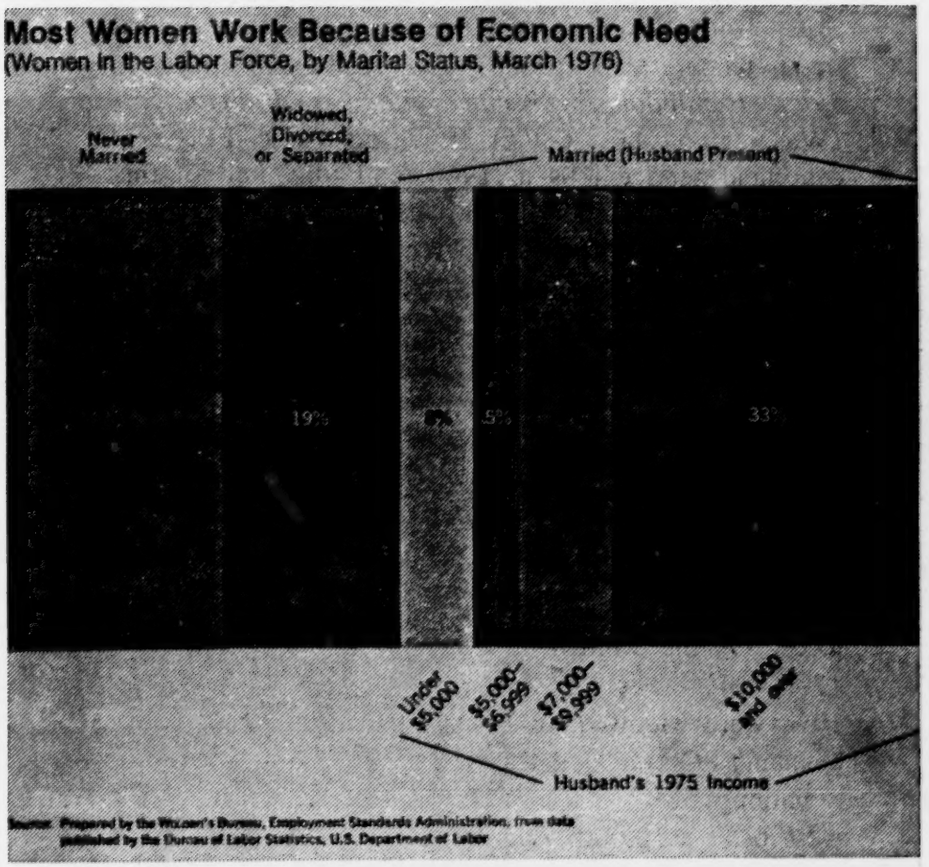
Occupation Group	*Distribution (%) Males*	*Females*
Total employed	100.0	100.0
White-collar workers	40.9	60.8
Professional and technical	13.7	14.5
Managers, officials and proprietors	14.6	5.0
Clerical workers	6.7	33.9
Sales workers	5.9	7.2
Blue-collar workers	45.9	15.4
Craftsmen and foremen	19.9	1.3
Operatives	18.3	13.3
Nonfarm laborers	7.7	0.8
Service workers	8.2	22.3
Private household workers	0.1	4.9
Other service workers	8.1	17.4
Farmworkers	5.1	1.7
Farmers and farm managers	3.2	0.3
Farm laborers and foremen	1.9	1.4

Source: U. S. Dept. of Labor, Manpower Administration, Manpower Report of the President, March 1972, p. 173.

The occupational distribution of non-White women was even more skewed toward the bottom of the occupational ladder. *U.S. Dept. of Labor, Women's Bureau, 1969; Handbook on Women Workers, Bulletin 294* (Washington, D.C.: G.P.O. 1969) pp. 105-6. Fifty percent held service jobs in 1968, and fully half of this group were private household workers, the lowest paying occupation. Only 30% of non-White women were white-collar workers as compared to 60% of the total female labor force.

There is evidence showing that work is a financial necessity for significant numbers of women. Also, in a society in which value often means monetary value, it is extremely unlikely that women can attain equality without equal earning opportunity. Some indications of the financial importance of paid employment for women can be gained from data from the female labor force. Of the women in the labor force, in March, 1976, 24% were never married, and an additional 19% were widowed, divorced or separated from their husbands. Of the married women who constituted the remaining 58%, 23% had husbands whose incomes were below $10,000. Undoubtedly, most of these women, and many whose husbands earn more than $10,000 were also working for compelling, economic reasons. (See Table 2)

Table 2:

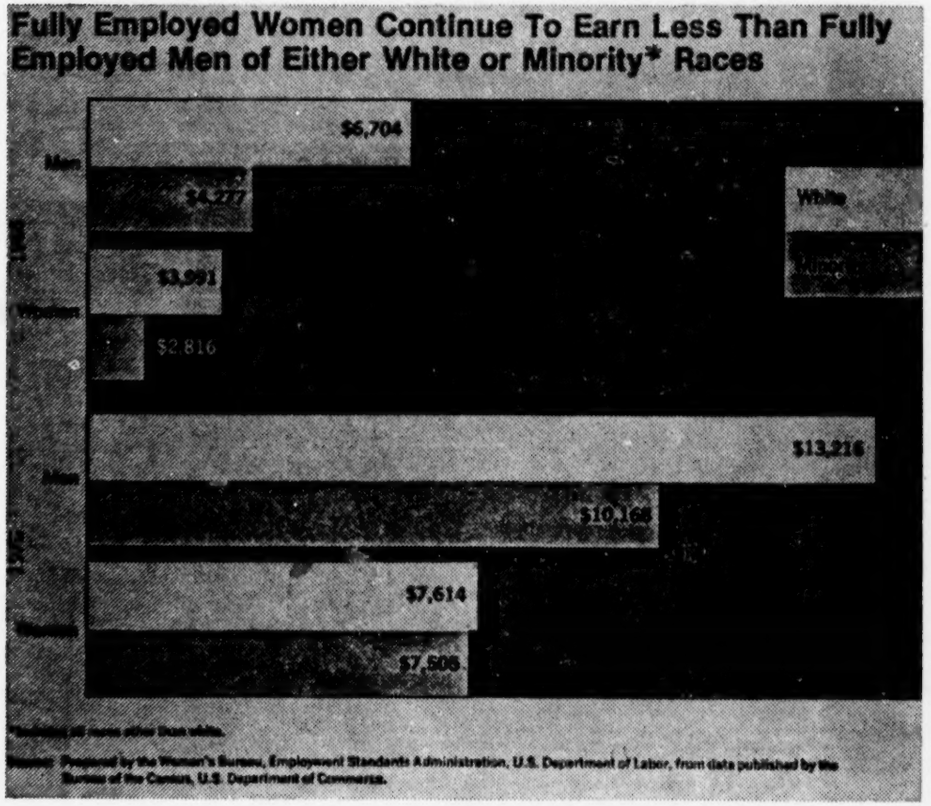


III.
Occupational Segregation Has Had a Severe Impact on Women's Earnings.

In earnings, in 1971, the annual median earnings of working women were $2,986.00, only 40% of the annual median earnings of working men. Non-White women were even more disadvantaged. The median earnings of those who were full-time, year-round workers was only $3,677 in 1968, or 46% of the median income of White men. Furthermore, the gap between the earnings of women and men increased between

1956 and 1696 and is now only slightly increased. (See Table 3)

Table 3:

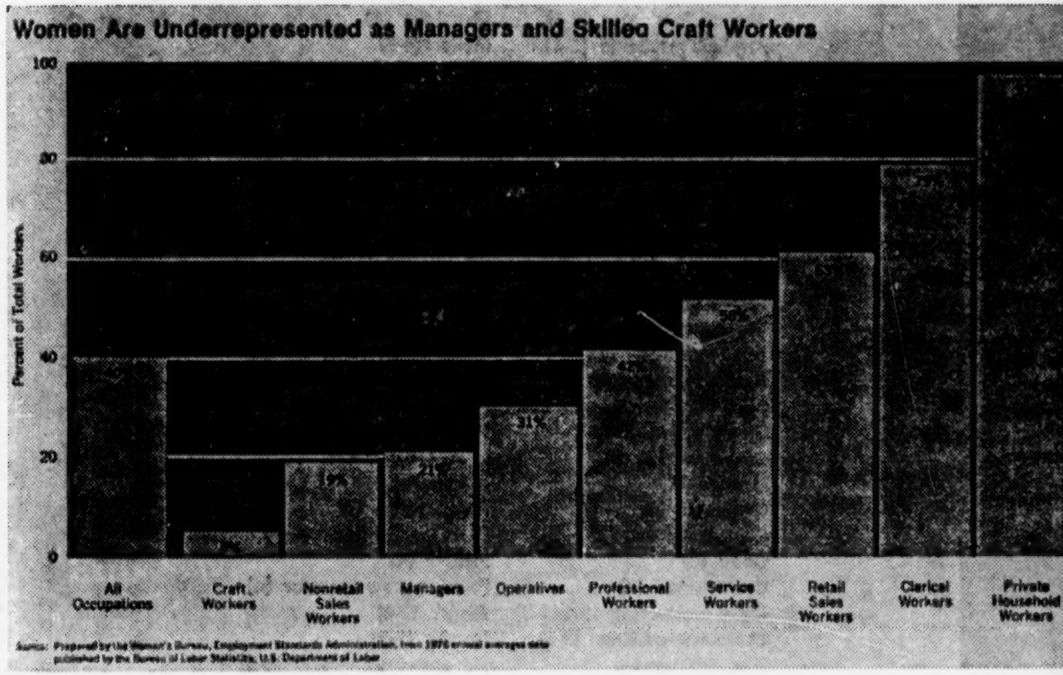


IV.
Bringing Women Into Skilled Craft Jobs and Apprenticeships.

Apprenticeships are programs through which workers learn a recognized trade by combining formal instruction with on-the-job training. Apprenticeships have long been a route by which young, unskilled men have entered skilled, well-paying jobs. The length of training varies generally. Except in a handful of female-type

trades, women who were not blatantly excluded have been discouraged from entering apprenticeship programs. (See Table 4)

Table 4:



The Department of Labor has listed numerous jobs which require training periods of at least two years, some as many as six years.

Table 5:

Jobs Which Require Apprenticeships

The 79 jobs listed below have training periods of at least 2 years and some as many as 6 years. Some of the occupations are broken down into more specialized jobs, so that the total number of apprenticeable occupations is close to 350. Numbers in parentheses indicate the number of years of training required.

Aircraft fabricator (3-4)
Airplane mechanic (3-4)
Arborist (3)
Asbestos worker (4)
Automotive body repairman (3-4)
Automotive mechanic (3-4)
Baker (3)
Barber (2)
Blacksmith (4)
Boilermaker (4)
Bookbinder (2-4)
Brewer (2-3)
Bricklayer (3)
Butcher-meat cutter (3)
Cabinetmaker-millman (2-4)
Candy maker (3-4)
Canvas worker (3)
Carman (4)
Carpenter (4)
Cement mason (2)
Cook (3)
Cosmetician (2)
Dairy products maker (2-3)
Draftsman-designer (3-5)
Electrical worker (4-5)
Electroplater (3-4)
Electrotyper (5-6)
Engraver (4-5)
Fabric cutter (3-4)
Farm-equipment mechanic (3-4)
Floor coverer (3-4)
Foundryman (2-4)
Furrier (3-4)
Glazier-glass worker (2-4)
Heat treater (4)
Ironworker (2-4)
Jeweler (2-4)
Lather (2-3)
Lead burner (5)
Leatherworker (3-4)
Lithographer (4-5)
Machinist (4)
Mailer (4-5)
Maintenance mechanic repairers (3-6)
Metal polisher and buffer (3-4)
Millwright (4)
Model maker (4)
Musical instrument mechanic (3-4)
Operating engineer (3-4)
Optical technician (4)
Orthopedic prosthetic technician (3-4)
Painter-decorator (2-3)
Patternmaker (5)
Photoengraver (5-6)
Photographer (3)
Plasterer (2)
Plate printer (4)
Plumber-pipefitter (4-5)
Printer (4)
Printing press operator (4)
Rigger (2-4)
Roofer (2-3)
Rotogravure engraver (5-6)
Sheetmetal worker (3-4)
Sign, scene, and pictorial artist (3-4)
Silversmith (3-4)
Stationary engineer (3-4)
Stereotyper (5-6)
Stoneworker (2-4)
Stonemason (3)
Tailor (4)
Telephone worker (4)
Terrazzo worker (3)
Textile technician (2-4)
Tile setter (3)
Tool and die maker (4-5)
Upholsterer (3-4)
Wallpaper craftsman (4-5)
Wire weaver (3-4)

Some of the occupations are broken down into more specialized jobs so that the total number of apprenticeable occupations is close to 350. Very few women are presently in these jobs. According to the International Women's Year Report, women have traditionally been excluded from apprenticeship programs that lead to high-paying skilled work. *The Spirit of Houston, An Official Report to the President, the Congress and the People of the United States,* March, 1978, p. 45.

Labor Department figures for 1976 revealed that of 11 million skilled, blue-collar workers, only 545,038 were women. In that same year, the percentage of women carpenters, electricians, painters, plumbers, machinists, mechanics and stationary engineers ranged from less than 1% to about 3% of the totals.

Conclusion.

Affirmative Action is particularly important to women because they have been effectively and systematically excluded from higher paying occupational opportunities for so long. The hope of American women is and has been that with the advent of the laws providing for equal opportunity, more and more employers will engage in Voluntary Affirmative Action Programs. Such programs will assist in ending sex segregation of jobs and broaden the employment opportunities for women.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

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BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE CONGRESSIONAL BLACK CAUCUS THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE CENTER FOR URBAN LAW

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Constitutional Provisions Involved

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Section 1. Neither slavery nor unvoluntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868] 5, 8

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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INTEREST OF *AMICI CURIAE*

The 63 national and local organizations which have joined as *amici curiae* in this brief represent many sectors of American society—civil rights groups, church groups, bar associations, rank and file labor groups, labor unions, political groups, women's organizations, community groups, and other organizations concerned with the public interest. They have done so from a mutual deep concern that the reversal of the *Weber* case is of vital importance to all affirmative action programs across the country.

These groups share a belief that over 200 years of discrimination on the basis of race, sex and national origin has resulted in freezing non-whites and women out of jobs, skills training, and promotional opportunities. Affirmative action has proven to be in many instances the only effective tool towards alleviating the still pervasive badges and incidents of slavery in American society. Any cut-backs in affirmative action programs and the underlying commitment which they represent will result in continuing the injustices described in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The pursuit of racial equality in this country is at a crossroads. It is the pivotal function of this Court to chart the proper course. Either this Court will reverse the majority decision (as *Amici* will strongly urge herein) and allow this country to move forward toward racial equality, or this Court will affirm the lower court's decision and precipitate a return to an earlier era.[1]

[1] *Amici* firmly believe that the loss of voluntary affirmative action as a remedial tool will most definitely mean reversal of progress already made. *Amici* would point out only that a recent Association of American Medical Colleges report stated that the proportion of first year Black medical students is the lowest it has been since 1970. The report said that Black students make up 6.4% of the first year class in the 124 medical schools in the country, as against 6.7% last year. This drop occurred despite the fact that most admission decisions in this year's class were made prior to the Court's ruling in *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978).

This case has striking parallels to the *Civil Rights Cases* of 1883, 109 U.S. 3 (1883). Speaking for the majority in the *Civil Rights Cases*, *supra*, Justice Bradley stated that there must come a time when the newly freed slave "takes the rank of mere citizen and ceases to be the special favorite of the laws." 109 U.S. at 25. Given the oppressive conditions facing the newly freed slaves, this transformation of civil inequality into formal legal equality is a remarkable example of judicial legerdemain. It contributed to what, in *Bakke*, Justice Powell called the virtual strangulation of the Equal Protection Clause in its infancy by "post-war judicial reactionism." *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733, 2749 (1978). It also led to the relegation of the freedmen into "second class citizenship," as Justice Harlan prophesied in his dissent in the *Civil Rights Cases*.[2] The social and political consequences of that abandonment cast a well-documented shadow that is still lengthening over this nation's history.

In a very real sense, this Court is challenged to meet its historic responsibilities to enforce the written Constitution. The Bradley Court rewrote history and ignored social reality. This Court must not repeat the same tragic errors.

This Court must not construct a judicial rationale for the abandonment of affirmative action by pretending that equality for racial minorities has been achieved. The

[2] 109 U.S. at 26, *United States* v. *Jefferson County School Board of Education*, 372 F.2d 836, 873 (5th Cir. 1966).

Court must "grasp the nettle",[3] and acknowledge the truth of what Justice Marshall said in *Bakke*:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. . . . 98 S. Ct. at 2802.

Affirmative action programs for Blacks and other racial minorities are not preferential treatment or "reverse discrimination", but rather a step toward the reversal of discrimination.

The majority ruling in the *Civil Rights Cases* is explicable only in view of the hostility of most whites toward the newly freed slaves. *Amici* fear that such conditions as inflation, unemployment, and a contracting economy, could serve as a politically expedient excuse for the betrayal of the constitutional promise of equality for racial minorities. That promise was renewed after the angry outbursts of Watts, Newark, and Detroit, which marked what to date has been known as the "Second Reconstruction." It may be politically expedient for the government and the courts to refuse to face the qualitatively different and harsher realities of institutionalized racism still facing Blacks and other racial minorities.[4]

In this historically significant case, which may have an adverse impact on millions of minorities and women, the issues go beyond the mechanical interpretations of

[3] See opinion of Justice Wisdom in *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965).

[4] Similarly, women coming into the work force are often the victims of institutional sexism and blamed for "taking men's jobs." Indeed, the outcome of this case may well have an adverse impact on affirmative action for women also. A portion of Kaiser's affirmative action plan not challenged by Respondents contains a 5% goal for women.

the anti-discrimination principle within Title VII and Executive Order 11246. Neither of these was promulgated in a vacuum. Both were born out of the great social upheavals of the late fifties and early sixties that followed the Court's historic decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

In a very real sense, Title VII and the Executive Order were passed and promulgated to fulfill the broken promises of the Civil War Amendments, in particular, the Thirteenth and Fourteenth Amendments.[5] The rights created by Title VII and the Executive Order for minor-

[5] The fact that the original Title VII in 1964 was passed pursuant to the commerce clause alone, and not pursuant to the commerce clause and Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment, does not mean that Title VII was not intended to enforce the mandates of those amendments. The 1963 Congress inherited the "state action" doctrine of the *Civil Rights Cases* of 1883, as well as Justice Bradley's evisceration of both the Thirteenth and Fourteenth Amendments. The Representatives and Senators who debated the Civil Rights Act of 1964 were clearly mindful of these legacies. Some wanted to accommodate them and some desired to challenge them. *See, e.g.*, the discussion on this point in Senate hearings on Title II, the public accommodations section of the Act. Then Attorney General Robert Kennedy presented the Administration's position supporting the use of the commerce clause to circumvent the Bradley rationale:

> We base this on the Commerce Clause which I think makes it clearly constitutional. In my personal judgment, basing it on the 14th Amendment would also be constitutional . . . .
>
> . . . I think that there is argument about the 14th Amendment basis—going back to the 1883 Supreme Court decision [Civil Rights Cases], and the fact that there is not state action—that therefore Congress would not have the right under the 14th Amendment to pass any legislation dealing with it . . . . I think that there is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice. . . .
>
> There cannot be any legitimate question about the Commerce Clause. That is clearly constitutional. We need to obtain a remedy. The Commerce Clause will obtain a remedy and there won't be a problem about the constitutionality. . . . Hearings before the Senate Committee on Commerce on S.1732, 88th Cong., 1st Sess., parts 1 and 2.

ity and white citizens must be interpreted in this context.

Only by acknowledging the national commitment to racial equality created by the Wartime Amendments, particularly the Thirteenth Amendment, can this Court put into the proper perspective the personal and class rights that Respondents assert were violated. Since this case involves actions of private parties in private employment decisions, of necessity it involves a reexamination of the Thirteenth Amendment, which the total Court in the *Civil Rights Cases, supra,* recognized as giving Congress and all the coordinate branches of government the power to directly and primarily enforce.

Amici contend that the actions taken by Kaiser and the United Steelworkers were fully protected by the Thirteenth Amendment, and that Respondents have no rights which contravene the rights of minorities protected by the Thirteenth Amendment.[6]

---

[6] Because of the extraordinary interest in the issues presented in this case, a large number of *amicus* briefs have been filed. The following statement of principles will apprise the Court of the mutual support of many *amici* for a number of basic positions in defense of the affirmative action program in controversy in the present case.

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As explained by the Equal Employment Opportunities Commission in its "Guidelines on Affirmative Action," which, as a result of Executive Order 12067, states the position of the executive branch: "Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunities in the workplace . . . . Voluntary affirmaitve action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII."

4. Title VII and the anti-discrimination principle should not be a search exclusively for villains and villainous acts. On the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. The remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing the pervasive patterns of discrimination adressed by Title VII and Executive Order 11246, but this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that, in many instances, appropriate "employment tools which recognize the race, sex, or national origin of applicants and employees" (EEOC's Affirmative Action Guidelines), such as those at issue in this case, are presently the only means by which true equal opportunity can be achieved.

8. Endorsement of voluntary affirmative action in no way diminishes the need for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

ARGUMENT

I. THE THIRTEENTH AMENDMENT PROTECTS EFFORTS TO OVERCOME BADGES AND INCIDENTS OF SLAVERY.

By 1883, the implementation of the Thirteenth and Fourteenth Amendments had come full circle. The Reconstruction Congress, which passed these amendments and the sweeping legislation designed to protect the civil and political rights of freedmen, had been decimated by the elections of 1876 and the Compromise of 1877. The newly freed slaves enjoyed few, if any, of the rights allegedly guaranteed to them. Indeed, they faced conditions similar to those they had suffered in slavery.

In 1883, several constitutional challenges to the Civil Rights Act of 1875, which prohibited discrimination in

public accommodations or public places of amusement, came before the Supreme Court. In the *Civil Rights Cases* of 1883, *supra*, the Court had to answer a fundamental question: Did Congress have the power to pass legislation to enforce all of the substantive rights mandated by either or both the Thirteenth and Fourteenth Amendments?

The Court's answer reflected the times. Chief Justice Bradley, writing for the majority, created the "state action" doctrine and disposed of the Fourteenth Amendment as a meaningful provision to vindicate the rights of the newly freed slaves. He wrote that the Fourteenth Amendment's enforcement powers only allowed congressional action that was secondary and corrective of discriminatory state actions. By implication, substantive rights, guaranteed by the Fourteenth Amendment, could not be protected unless affected by state action.

A. In the *Civil Rights Cases* of 1883, the Entire Court Agreed That The Thirteenth Amendment Was Designed To Abolish Slavery as well as its Badges and Incidents. The Bradley Majority Disagreed With Harlan On The Nature of Such Badges and Incidents.

Justice Bradley found that the Thirteenth Amendment was not restricted to the mere prohibition of discriminatory action:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. *Civil Rights Cases, supra,* 109 U.S. at 20.

In addition, Justice Bradley held the Thirteenth Amendment to have a "reflex character, establishing and declaring civil and political freedom throughout the United States." *Id.* He assumed that Congress was clothed with "the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.*

Justice Harlan fully agreed with this characterization. His vehement dispute was with how to define and what constituted the badges and incidents of slavery. For Justice Bradley, the badges and incidents of slavery were limited to those legal disabilities imposed on slaves—such as not having the right to sign and enforce a contract, or purchase and inherit property—the literal trappings of human bondage.

Justice Harlan understood "badges and incidents" to refer to all discrimination on account of race. He believed that the Thirteenth Amendment gave Congress the power to legislate against those discriminations

> I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to free men of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights enjoyed by other free men in the same state. 109 U.S. at 36.

Justice Harlan further reminded the Court of its position nine years earlier in the *Slaughter House Cases*, 109 U.S. at 36-37. The Court had disapprovingly characterized certain state laws restricting the right to contract of people of African descent. These laws excluded them from many "occupations of gain" and prevented them from freely traveling. The Court said that this:

> imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. *Id.* at 37.

There was no doubt that such laws contravened the Fourteenth Amendment. As to the Thirteenth Amendment, Justice Harlan rhetorically asked:

> Can there be any doubt that all such legislation might have been reached by . . . [direct] power to enforce the thirteenth amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that amendment? *Id.*

Only Justice Harlan gave a meaning to the concept of badges and incidents of slavery that gave substance to the Thirteenth Amendment as a charter "declaring civil and political freedom throughout the United States." 109 U.S. at 20.

B. Justice Harlan's Broad Understanding of What Were Badges and Incidents of Slavery Was Based On His Belief That the Thirteenth Amendment Overruled the Theory of Racial Inferiority Enunciated In the *Dred Scott* Opinion.

Justice Harlan had understood from "repeated declarations" by the Court that the Thirteenth Amendment was enacted to abolish an institution that *"rested wholly upon the inferiority as a race, of those held in bondage"*. From this he concluded that discrimination based on theories

of racial inferiority was a substitute for slavery and as such, a badge and incident of slavery. 109 U.S. at 39.

Central to this conclusion was his view that the passage of the Thirteenth Amendment completely overruled the infamous opinion in *Dred Scott* v. *Sanford*,[7] 60 U.S. 393 (1856).

Thirty years later, Justice Harlan paraphrased Chief Justice Taney's odious characterization of the Negro race in that case:

> . . . '[T]hey had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for this benefit;' That he was 'bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;' and that 'this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion. 109 U.S. at 31.

For Justice Harlan, the Thirteenth Amendment outlawed all the badges and incidents of slavery that were based on the racial inferiority and white supremacy theories enunciated in *Dred Scott*, *supra*. The Bradley opinion failed to even mention or acknowledge this fact.

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[7] See Kinoy, The Constitutional Right of Negro Freedom. 21 *Rutgers Law Review* 387 (1967).

C. A Majority of the Supreme Court Adopted Justice Harlan's Formulation of the Badges and Incidents of Slavery in *Jones* v. *Alfred H. Mayer Co.* and *Runyon* v. *McCrary*.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968), a majority of the Supreme Court reminded the nation that " '[b]y its own unaided force and effect', the Thirteenth Amendment 'abolished slavery and established universal freedom.' "[8]

Writing for the majority, Justice Stewart ruled that "racial discrimination which herds men into ghettos" is a "relic of slavery" prohibited by legislation passed pursuant to Section 2 of the Thirteenth Amendment, 392 U.S. at 442-3.

The Court did more than say that the Thirteenth Amendment protected Blacks and other racial minorities[9]

[8] In *Jones*, the Court upheld an effort by black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section one of this Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." In resting judicial action upon this statutory basis the Court was forced to face the ultimate question of the source for Congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment " 'to *pass all laws necessary and proper* for abolishing all badges and incidents of slavery in the United States.' " Arthur Kinoy, "The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on *Jones* v. *Alfred H. Mayer Company*," 22 Rutgers L. Rev. 537, 538-539 (1968) (footnotes omitted).

[9] *Amici* believe that other racial minorities of color suffer from the badges and indicia of slavery imposed on Blacks. *Amici* agree with the views propounded by *Amici* Rutgers University, Rutgers Alumni Association, and the Student Bar Association of the Rutgers Law School in their brief in *Bakke, supra*, where it is stated:" American Indians, Hispano-Americans, and Asian-Americans are also persons of color belonging to racial classes whose position makes them subject to the badges and incidents of servitude. Social scientists have defined minorities as groups of people 'who, because of

from purely private racial discrimination in the sale of property. To a large degree, the Court embraced the broad Harlan analysis of the rights created and protected by the Thirteenth Amendment. In the courageous language of Justice Stewart, the Court pointed out:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress weer powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man

their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and *unequal treatment*, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of society.' G. Simpson & J. Yinger, *Racial and Cultural Minorities; An Analysis of Prejudice and Discrimination* II (4th ed. 1972) (emphasis added). Pursuant to Title VII of the Civil Rights Act of 1964, the United States Equal Employment Opportunity Commission requires reporting firms to provide periodic employment statistics on blacks, orientals, American Indians, and Spanish surnamed Americans. Employer Information Report Form EEO-1. These groups fit the social science definition, as the EEOC has recognized. Although in this brief *Amici* emphasize the excluded condition of black Americans, the situation of these other racial minorities replicates in varying degrees the situation of blacks. (p. 7)

> can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep. 392 U.S. at 441-443.

These words are remarkably similar to those of Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). Much of the argument in *Jones* was reinforced by the majority in *Runyon* v. *McCrary*, 427 U.S. 160 (1976):

> The statutory holding in *Jones* was that the '[1886] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property,' 392 U.S. at 436, 88 S. Ct., at 2201. One of the 'rights enumerated' in § 1 is 'the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .' 14 Stat. 27. Just as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees. 427 U.S. at 170.

Both *Jones*, *supra* and *Runyon*, *supra* reestablished the proper role of the Thirteenth Amendment in helping this nation overcome its legacy of slavery and racism. In much the same way that the racial exclusion of Blacks from white neighborhoods is a relic of slavery, so is the virtual exclusion of Blacks and other non-white minorities from the skilled trades a badge and incident of slavery. Just as in *Jones*, *supra*, where the Court found that 42 U.S.C. § 1982 protects Blacks and minorities from racial discrimination in the sale or lease of private

housing, so does the Thirteenth Amendment protect efforts by parties that are designed to overcome and abolish the badge of slavery manifested by the current underrepresentation of minorities in the skilled trades.

II. INSTITUTIONAL DISCRIMINATION AGAINST RACIAL MINORITIES AS CURRENTLY MANIFESTED IN THEIR DISPROPORTIONATE UNDERREPRESENTATION IN THE SKILLED TRADES IS A BADGE AND INCIDENT OF SLAVERY.

A. Institutional Discrimination Against Racial Minorities In The Skilled Trades Continues Through The Present.

Amici use the phrase "institutional discrimination" [10] against racial minorities to refer to the phenomenon whereby this nation's institutions almost reflexively grant advantages to whites and impose disadvantages upon Blacks and other racial minorities. Institutional discrimination against racial minorities continues to flourish in the "skilled trades," even though some progress has been made as a result of Executive Order 11246 and Title VII. In May, 1976, the United States Commission on Civil Rights (hereinafter Civil Rights Commission) issued a report entitled *The Challenge Ahead: Equal Opportunities in Referral Unions.* This report (hereinafter referred to as the Report) is of particular relevance in this case because it is the referral unions, particularly the building trades unions, which have historically provided training for trade craftsmen. Further, it was these referral unions that Kaiser apparently relied on to refer trained craftsmen to them in Gramercy prior to the institution in 1974 of the training program at issue in this case.

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[10] *See* J. Feagin and C. Feagin, *Discrimination American Style: Institutional Racism and Sexism*, Chs. 1-3, 6 (1978); U.S. Commission on Civil Rights, *Racism in America: How to Combat It* (1970).

The Civil Rights Commission found in its examination of the statistics in the 1974 EEO-3 reports of 15 major building trades unions that, at most, minorities constituted 6.2% of journeymen working in the construction industry in 1972, and more likely only 5.5%.[11] In view of the time required to complete an apprenticeship program, usually two to four years (Report at 53), it is unlikely that these statistics had changed significantly by 1974, when Petitioners, Kaiser Aluminum and the United Steelworkers, negotiated the contract provision challenged herein. It is also safe to state, as did the Civil Rights Commission in 1976, that:

> [T]he percentages of minorities . . . among journeymen in the construction industry are extremely low, whether compared with population or relevant labor force statistics. Report at 52.

The Civil Rights Commission concluded that the "extremely low" percentages of minorities within the construction industry resulted from two sources: (1) overt discrimination and (2) institutional discrimination. Such overt discriminatory practices included, among other things, "white only" clauses in many union constitutions until the mid-1960's and exclusion of minorities from participation in apprenticeship examinations. The Report recognized that while overt discrimination is not as "widespread as it once was, it is far from uncommon" (Report at 92) and that although a few "progressive locals" have made the entry of racial minorities a "relatively routine matter" *id.*, the most common form of discrimination which accounts for the continued exclusion of racial minorities is the use of seemingly neutral practices that disproportionately exclude them.

[11] The difference in percentages reflects irregularities in data provided by the unions on the EEO-3 forms, including: failure to report; overestimation of minority membership; categorical combining of non-construction and semi-skilled workers with construction journeymen; combining apprentices with journeymen; and failure to report actual referral opportunities. Report at 38.

As for institutional discrimination, the Report states:

> Institutional discrimination occurs when policies and practices used in selecting apprentices and applicants for membership and employment have an adverse impact on minorities and women, even when these policies and practices are not intentionally applied in a discriminatory manner. The adverse effect these policies and practices have on minority groups may have been caused by the past intentional discriminatory policies of a union or by economic, educational, and social disparities in the society. Whatever the cause, the effect is exclusion from employment. Report at 64.

The Report identified, and discussed at length, four common institutional practices within building trade unions which have caused the virtual exclusion of significant numbers of racial minorities: (1) membership selection practices; (2) restrictions on the size of membership; (3) methods of recruitment; and, (4) examinations. Report at 65-92.

In summary, the Civil Rights Commission concluded:

> The effect of intentional and direct employment discrimination in the building trades continues to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunities of minorities and women is unfortunately quite small. Report at 94.

B. The Current Disproportionate Underrepresentation of Minorities in the Skilled Trades Reveals Past and Continuing Legal Disabilities on the Rights of Minorities to Contract in Violation of 42 U.S.C. § 1981.

If today, minorities make up close to 20% of the nation's population, but make up only 5.5% of the jour-

neymen in the skilled building trades, it is only logical to state that some mechanism has been operating to cause and perpetuate this disproportionate underrepresentation.

Amici will not repeat here the history of the exclusion of minorities from the skilled trades.[12] *Amici* would point out that such disabilities as "white only" clauses in skilled trade unions' constitutions, the exclusion of minorities from taking journeymen's exams, or the exclusion of minorities from hiring halls[13] severely impaired minorities' rights to contract for jobs in the skilled trades.

Even Justice Bradley, in the *Civil Rights Cases, supra*, conceded that placing burdens on the making of contracts was an "incident of the institution" of slavery that Congress identified and outlawed by passing the Civil Rights Act of 1866 (42 U.S.C. § 1981). Although after 1883, this Act was no longer used by the courts to vindicate the rights of minorities (thus discouraging actions to enforce it), there can be no doubt that massive and unanswered violations of its provisions occur daily. If the 1866 Civil Rights Act, which was not "rediscovered" as a basis of jurisdiction for employment discrimination until *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), had been consistently enforced over the years so as to invalidate racially motivated refusals to contract for skilled trades jobs, or enforced so as to have fought craft unions that placed obstacles in the way of minorities' rights to join the unions, the current underrepresentation would most likely not be as extreme as it is today and affirmative action would not be necessary. This identifiable incident of slavery still perpetuates the underrepresentation of minorities in the skilled trades.

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[12] *See* Brief *Amicus Curiae* of the NAACP Legal Defense and Education Fund, Inc., submitted in this case.

[13] *See* part A of this section of the argument.

III. THE CONSTITUTIONAL CONTEXT IN WHICH TITLE VII AND EXECUTIVE ORDER 11246 MUST BE INTERPRETED IS ONE WHICH EFFECTUATES THE MANDATE OF THE THIRTEENTH AMENDMENT TO ERADICATE THE BADGES AND INCIDENTS OF SLAVERY.

A. Executive Order 11246 and Title VII Cannot Be Read to Contravene the Dictates of the Thirteenth Amendment.

Although Title VII was not passed pursuant to the Thirteenth Amendment, the time-honored principles of this country's constitutional government require the courts to interpret all statutes and executive orders consistently with the provisions of the Constitution. If a statute or executive order is inconsistent with any portion of the Constitution, or if it is applied in such a manner as to be inconsistent with the Constitution, then it cannot stand. *Marbury* v. *Madison*, 5 U.S. 103 (1803).

Title VII, therefore, cannot be constitutionally interpreted by this Court unless the interpretation is consistent with every aspect of the Constitution, which involves the mandates of the Thirteenth Amendment. Similarly, under Executive Order 11246, the Presidential power to further federal interests in the procurement of goods or services also must be consistent with the Constitution, including the mandates of the Thirteenth Amendment.

Furthermore, the Thirteenth Amendment is self-executing. It requires no implementing legislation for its enforcement.

> By its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom. *Civil Rights Cases, supra, Jones* v. *Alfred H. Mayer Co., supra* at 438.

Because the Thirteenth Amendment is self executing, it becomes automatically the context within which civil rights legislation must be interpreted.[14]

Because the interpretation of Title VII and Executive Order 11246 advanced by the courts below hinders the achievement of the Thirteenth Amendment objective to eliminate the badges and incidents of slavery, it cannot be sanctioned by this Court. That interpretation must be rejected.

B. When Read Consistent With the Thirteenth Amendment, Title VII and Executive Order 11246 Encourage Efforts to Overcome the Badges and Indicents of Slavery.

Title VII creates rights for all persons to be free of employment discrimination based on race, color, religion, sex, or national origin. This principle, and its parallel in other civil rights laws, did not emerge on the legal landscape merely because of abstract notions of natural justice. Title VII was passed against a factual backdrop of an aroused citizenry no longer tolerant of systematic, pervasive, and unabashed discrimination against the descendants of this nation's slaves. Although the race relations of this country have undergone some positive changes in response to the great push for civil rights in the 1960's, overt racism still persists; covert racism is still widely practiced; and relatively pervasive basic ignorance of the realities of racism still flourishes. The

[14] The Thirteenth Amendment reaches private employment contracts and justifies prohibitions against racial discrimination in that context. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones* v. *Alfred H. Mayer Co.*, *supra* at 441 n.78. While these cases upheld Congressional legislation that may be appropriate under the Thirteenth Amendment, both cases indicated that the Thirteenth Amendment does not require implementing legislation. The Thirteenth Amendment is "an absolute declaration that slavery shall not exist in any part of the United States." *Civil Rights Cases*, *supra* at 28. *See* Section I, *supra*.

effects of continuing white supremacist attitudes and practices are all too apparent in any review of the social and economic indicators of equality.[15]

The concept of affirmative action has developed as a critical theory for moving the nation beyond a mere commitment to non-discrimination to a means for remedying the many current expressions of this nation's history of slavery, white supremacy, and racial discrimination. Affirmative action programs are remedial tools responding directly to this historic, negative, and stigmatic use of race.

The ruling of the court below denies this history. Its premise is that all discrimination is the same, despite the historical reality to the contrary. All discrimination is not the same. White people simply have not, do not, and will not suffer from the affirmative use of race in ways which should cause this Court to restrict racial affirmative action programs.

Amici contend that while Respondents have rights under Title VII and Executive Order 11246,[16] Respondents' rights do not outweigh the constitutional protection afforded the Petitioners pursuant to the Thirteenth Amendment to implement the affirmative action plan challenged herein. Contrary to the demands of the Thirteenth Amendment, the court below would interpret Title VII to forbid voluntary effective measures aimed at eliminating the "badges and incidents of slavery." It would make voluntary race conscious devices designed to end the overrepresentation of whites in preferred areas of employment unlawful. It would make the voluntary efforts to build a new system free of the institutional

[15] See, *e.g.*, United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (August, 1978).

[16] See *McDonald* v. *Santa Fe Transportation Co.*, 427 U.S. 273 (1976).

racial discrimination which today dominates employment relations in this nation illegal.

It is the need to undo the badges and incidents of slavery which provide the basis and justification for reconciling the competing principles argued by the parties in this case. On the one hand, all people have the right not to be discriminated against on the basis of race; on the other hand, this nation is constitutionally committed to eliminating the still pervasive effects of slavery. To achieve this end, Petitioners must be permitted to use race in affirmative ways to effectuate the goal of the Thirteenth Amendment.

C. The Interpretation of Title VII and Executive Order 11246 by the Court Below Defeats Rather Than Effectuates the Mandate of the Thirteenth Amendment.

(1) *The court improperly searched for villains and victims.*

The trial court below erred in making two assessments: (1) that those who would participate in the benefits of affirmative action programs must show that they have been victims of past discriminatory conduct by the proponents of the affirmative action plan, and (2) that the proponent of an affirmative action plan using race as a criterion must reveal itself as a "villain" in the past by demonstrating evidence of its prior practice of racial discrimination. These conclusions of the court below evade the purposes of the Thirteenth Amendment.

This Court has properly identified two different but interrelated purposes of Title VII. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-18, 421; *Franks* v. *Bowman*, 424 U.S. 747, 767 n. 27, 771 (1976). The first and primary purpose is "prophylactic," designed to encourage employers and unions to change any and all of

their employment practices that create barriers to equal opportunity. The second purpose is compensatory, and allows individuals to be "made whole" for specific violations of the law.

The prophylactic purpose emphasizes the eradication of *conditions* caused by barriers to equal opportunity. The "make whole" purpose stresses the rights of identified *victims*.

As Justice Stewart recognized in *Albemarle*, *supra*, the threat of "make whole" remedies provides a spur or catalyst to the achievement of the prophylactic objective of Title VII. Conversely, if prophylactic measures are taken, discriminatory conditions will have been eliminated so that fewer individuals will need to be made whole. This case involves voluntary action, spurred by the threat of "make whole" remedies, pursuant to the prophylactic purposes of Title VII.

Title VII of the 1964 Civil Rights Act promotes the adoption of voluntary remedial affirmative training, hiring and promotional schemes. Courts have ordered affirmative action under Title VII, including race conscious temporary remedies, such as preferences, goals and timetables in hiring and promotion.[17] Consent decrees approved by the courts have also included such provisions.[18] Further, the determination that affirmative action is also required under Executive Order 11246 and conciliation

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[17] *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *Southern Illinois Builder's Assoc.* v. *Oglivie*, 471 F.2d 680 (7th Cir. 1972); *Assoc. General Contractors of Mass. Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Crater* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972); *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355 (1977).

[18] *United States* v. *Allegheny Ludlum Industries, et al.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

agreements under Title VII of the Civil Rights Act has been given the approval of the courts.[19] And, in applying the intent and purposes of Title VII and Executive Order 11246, recognition has been given to the appropriateness of a group remedy. The validity of a group remedy, in contrast to a requirement that a prospective beneficiary of an affirmative action program establish that he has been the victim of past racial discrimination at the hands of the sponsor of the program is not without justification.[20] Indeed, the Wartime Amendments, including the Thirteenth, have been construed to transcend the limitations of race.[21] It is virtualy undeniable that race and the concommitant notions of inferiority—with regard to Blacks—was a vital underpinning of the institution of slavery. The effects of racial discrimination were imposed upon the injured parties as a group. Race was the sole determining factor. It was race and race alone that was responsible for the underrepresentation of Blacks and other racial minority groups in the specialized crafts.[22] Therefore, if the effects of such racial discrimination as reflected in craft membership is ever to be eliminated, then we need not identify individual "vic-

[19] *Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

[20] *See* generally, Askin, F., *Eliminating Racial Inequality in a Racial World*, 2 Civil Liberties L. Rev. (1975).

[21] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[22] Although the concept of racial inferiority is a "badge and incident of slavery", it is anomolous to state that Blacks were not denied the opportunity for skill development during slavery, but as a facet of the "peculiar institution" were required to serve as skilled craftsmen to maintain the plantation as an ongoing, viable economic entity. Only as freed slaves did craft participation on the part of Blacks become an issue. In the marketplace of skilled labor, Blacks were not allowed to compete, thus preventing them from continuing as skilled craftsmen although as slaves, skilled services were required. Exclusion of freed slaves from skilled trades was justified on the basis of Black inferiority, a "badge and incident" of slavery.

tims" or "villains". It should be sufficient to recognize that a class of people has been systematically ostracized on the basis of race and if their current underrepresentation is to be remedied, then race alone is necessary to identify the target population for purposes of remediation.

The standard for an employer seeking to bring his work force in compliance with Executive Order 11246 [23] and Title VII [24] is not "proof of past discrimination." To require that an employer prove intentional discrimination against himself *completely subverts* the congressional intent of Title VII, and the underlying intent of the Executive Order. The Equal Employment Opportunity Commission seeks compliance with Title VII under a reasonable belief standard, and §§ 703(a) and 703(d) are not prohibitions to affirmative, remedial, preferential remedies.

(2) *The court inaccurately characterized the facts in this matter as an employment seniority case.*

The majority opinion of the court below characterized the issues raised by this litigation as impacting upon seniority rights. The court focused upon the standards

[23] In speaking to his amendment to strike a provision transferring Executive Order enforcement to E.E.O.C., Senator Saxbe stated:

> The Executive Order should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required. 118 Cong. Rec. 1385. *See also, Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor, supra.*

[24] *Albemarle Paper Co.* v. *Moody, supra*, citing *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973); Title VII, Civil Rights Act, 1964, 2000 *et seq.*

for altering seniority rights as a consequence of remedying past discrimination under the "rightful place" theory articulated by the Supreme Court in *Franks* v. *Bowman, supra*, and then determined that absent a finding of past discrimination, all employees at the Kaiser Plant were in their "rightful place," "since none [had] obtained any unfair seniority advantage at the expense of any other." *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 266 (5th Cir. 1977). The court below concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and the USWA, or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus, violates Title VII. 563 F.2d 216 at 226.

Amici contend that seniority exists as a by-product of collective bargaining. It carries with it certain agreed to rights and privileges as determined between management and the collective bargaining agent which are protected by the Constitutional right to contract and the public policy favoring collective bargaining agreements.

The Court in *Franks* rejected the argument that the granting of seniority relief deprived other employees of "vested rights":

> This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. [Citations omitted] The Court has also held that a collective bargaining agreement *may go further, enhancing the seniority status of certain employees for the purposes* of furthering public policy interests *beyond what is required by statute* . . . even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. 424 U.S. at 778, 779.

The Court continued:

> The ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in other areas of public policy interests. *Id.*, at 779.

One of the most significant aspects of seniority is that it provides the means of determining the order by which both promotions and lay-offs may take place when all other factors appear to be equal. This case addresses neither the issues of promotion nor lay-off, but, instead, addresses those factors *other than seniority* which establish qualifications for advancement within the company.

The affirmative action program under review here must be seen as a training program, and, in that sense, educational. The Kaiser plan was designed to develop, within certain employees, skills which would permit them, as successful participants in the training program, to become eligible for advancement to job status as craftsmen, as opposed to that of lesser-skilled production workers. The means of selection for the affirmative action training program were tied to seniority only because of its convenience and availability as a selection criterion.

This is not a case in which a promotion roster was being altered, although courts have condoned the alteration of promotion rosters based upon race.[25] This is not a case in which hiring policies have been altered to accommodate racial minority groups; nor is this a case

[25] *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.C. N.J. 1966) aff'd, 401 F.2d 1254 (3rd Cir. 1970).

where selection on the basis of race precludes non-participants in the program from ever achieving the goals and purposes of the program, that is, participation in the crafts. Access to the crafts has long been accomplished without the benefit of company-sponsored training programs. Indeed, this on-the-job training program was created only because of the underrepresentation of Blacks and other racial minorities in the crafts. The traditional methods for entrance into the crafts did not produce significant numbers of Blacks and other racial minority group members. In the face of this certainty, the company took it upon itself to train significant numbers of racial minorities for participation within the crafts.

No duty existed by virtue of seniority rights to train members of the class which predominated within the crafts. But where an employer determines upon analysis of his work force that he is potentially liable for unlawful discrimination under Title VII, it is his duty to correct the discriminatory situation voluntarily.

Both Executive Order 11246 and Title VII (706(b)) envision voluntary compliance in the enforcement scheme which the Supreme Court endorsed in *Albemarle Paper Co.* v. *Moody* (quoting from *U.S.* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Consent decrees have also been sanctioned by the Court.

The specific language of 703(j) was emphasized by the court in *Contractor's Assoc., supra*:

> Possibly an employer could not be compelled, under the authority of Title VII, to embrace such a program, although 703(j) refers to percentages of minorities in an area work force, rather than percentages of minority tradesmen in an available trade work force. We do not meet that issue here, however, for the source of the required contract provision is Executive Order 11246. Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal. 442 F.2d at 172.

Assuming, but not admitting, that 703(j) in any way limits remedies under Title VII, the limitation is perhaps in the context of hiring, probably not promotion, and certainly not training programs. A careful reading of 703(j) suggests the only practice not required of employers is "hiring" in order to balance the "total number of percentages, of persons of any race, color, religion, sex or national origin employed by an employer in comparison with their representation in the work force." Training programs such as are at issue in the instant case, that are intended to alter the available work pool to include qualified Blacks, are not addressed by 703(j) of Title VII. And, more importantly, attempts to alter the work pool from which an employer obtains his personnel to overcome underrepresentation of Blacks and other racial minority group members are protected by the Thirteenth Amendment and cannot be thwarted by misplaced notions of seniority rights which ignore the strength of constitutional protection.

IV. GUIDELINES ON AFFIRMATIVE ACTION RECENTLY PROMULGATED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENUNCIATE FOR THE EXECUTIVE BRANCH COMPREHENSIVE AND PROPER STANDARDS GOVERNING FEDERAL CIVIL RIGHTS LAW WHICH ARE IN ACCORDANCE WITH THE MANDATES OF THE 13TH AMENDMENT.

A. EEOC's Affirmative Action Guidelines Are Based Upon the Commission's Reading of the Legislative Purpose of Title VII.

EEOC's newly enacted affirmative action guidelines (44 Fed. Reg. 4422 (Jan. 19, 1979) are explicit in their reading of the legislative history of Title VII:

> Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Section 1608.1(b).

If the end of Title VII is to "improve the economic and social conditions of minorities and women" by overcoming widespread and diverse patterns of discrimination, the preferred means to achieve this objective is "voluntary action."

> . . . Congress strongly encouraged . . . persons subject to Title VII . . . to act on a voluntary basis to modify employment practices which constituted barriers to equal opportunity, without awaiting litigation or formal governmental action. *Id.*

Based on this understanding of the purposes of Title VII, Section 1608.1(c) of the guidelines declares its interpretation in furtherance of this legislative purpose:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.

The seeming inconsistency created by the affirmative use of race, sex, or national origin necessitated the guidelines:

> Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Section 1608.1(a)

The Guidelines dispel any possible contradiction, not only by reference to the legislative purpose of the Act, but also by drawing upon knowledge that a failure to reconcile the competing principles would cause serious difficulties:

> The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. *Id.*

As noted in the joint opinion of Justices Brennan, White, Marshall, and Blackmun in *Regents of the University of California* v. *Bakke*, *supra*, in the context of Title VI:

> We have recently held that '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."' (Citations omitted). This is especially so when, as is the case here, the literal application of what is

> believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose. 98 S. Ct. at 2774.

The interpretation advanced by EEOC's affirmative action guidelines properly "clarify and harmonize the principles of Title VII . . ." Section 1608.1(a). This statement by the executive branch should be given great deference. Not only because it is the view of the executive branch of a congressional act, and thus of at least co-equal weight with that of the judiciary (*see* part D of this argument), but also because it is amply supported by congressional debates.

Amici share EEOC's understanding of the legislative history of Title VII, as it is wholly consistent with this Court's ruling in *Griggs*, 401 U.S. 424, *Albemarle*, and *Franks*. *See* Section III, *supra*. EEOC's finding of the congruency of Title VII with Executive Order 11246 is also correct.

> The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. . . . The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities. 44 C.F.R. at 4423.

For a more detailed analysis of the 1972 Title VII debates, *amici* refer the Court to the *amicus curiae* brief submitted in this case by the NAACP Legal Defense and Education Fund, Inc.

Assuming for the purposes of argument that there are other possible readings of the legislative intent behind Title VII, *amici* contend that at best, those readings would lead to an ambiguous or ambivalent intent upon the part of Congress. As *amici* argued in Section I of this brief, in such circumstances the Court must interpret that ambiguity or ambivalence in accordance with the mandates of the Thirteenth Amendment so as not to erect barriers to the elimination of vestigial badges and incidents of slavery. EEOC's interpretation of the legislative history is consistent with the Thirteenth Amendment and should be embraced by this Court for this reason as well.

B. The Standards of Reasonableness Contained in EEOC's Affirmative Action Guidelines Give Employers, Unions, and Others Subject to Title VII the Legal Latitude and Protection Required to Encourage Voluntary Affirmative Action.

The standards spelled out by the guidelines reveal a practical understanding of the interests of those subject to Title VII's commands and of the existence of institutional discrimination.

The core of the guidelines is their "three R's" concept: reasonable self-analysis, a reasonable basis for concluding that action is appropriate, and reasonable action. Section 1608.4.

If the self-analysis (Section 1608.b(4)) discloses any one of the conditions described as a "reasonable basis for concluding that action is appropriate" (Section 1608.4 (b)), voluntary action which is "reasonable in relation to the problems disclosed by the self-analysis" (Section 1608.4(c)) may be taken. These "reasonable actions" include "appropriate employment tools which recognize the race, sex or national origin of applicants or employees" and "may include . . . practices which will eliminate" the conditions revealed by the self analysis. *Id.*

The circumstances under which one can conclude that voluntary affirmative action is appropriate are explained in Section 1608.3. Of particular relevance to this case is Section 1608.3(c) which explains that "historic restrictions" by other than the party taking affirmative action may cause the "available pool . . . of qualified minorities and women" to be "artificially limited." The section goes on to encourage voluntary action to overcome such circumstances, including training programs such as the one at issue in this case.

These standards do not in any way make the lawfulness of affirmative action hinge on the lawfulness of the prior conduct of the party taking affirmative action. (Section 1608.4(b); Section 1608.3.) Evidence of past discrimination of any kind by that party—even the existence of a "*prima facie*" case—is not a pre-condition for taking affirmative action.

C. EEOC's Affirmative Action Guidelines Do Not Condition Affirmative Action on the Existence of Evidence that the Law May Have Been Violated; They Recognize That the Interest of Parties Who Implement Affirmative Action Plans Is to Suppress and not to Produce Evidence of Their Own Discriminatory Actions and to Portray Themselves as Remedying "Societal Discrimination."

This case convincingly demonstrates and simple logic confirms that it is unrealistic to expect those who can be held liable for violating Title VII and the civil rights of minorities and women to come forth with evidence exposing themselves to such liabilities. It is far more likely that employers and unions will attribute existing segregated areas to discrimination by others or to acts which, though discriminatory in result, nonetheless were legal. Furthermore, in many cases, such attribution will be entirely accurate.

There is a "smoking gun" in this case: the clear evidence of past discrimination alleged by a government agency. Petitioners, the United States of America, have filed with this Court findings made in 1971 by federal compliance officers, acting pursuant to Executive Order 11246, that craft employment practices at Kaiser's Gramercy plant did not conform with the O.F.C.C.'s anti-discrimination requirements. (Brief of the United States of America on *Petition for Writ of Certiorari* at 18.) Additional findings by federal compliance officers in 1973 state that Kaiser had waived its prior experience requirements for whites, but not for Blacks who had applied for craft positions. *Id.* Furthermore, those experience requirements had not been validated. (1973 findings filed with this Court by the United States of America, at 1-2.) Were it not for the petition for *certiorari* to this Court, and the government's resulting decision to file these critical documents with the Court, this case might have proceeded under the illusion that there had been no past discriminatory acts by the Petitioners.

Although the "smoking gun" was not presented to the district court, there was overwhelming evidence of its existence: the repeated testimony that Kaiser and the Union were acting to conform to the requirements of Executive Order 11246 and Title VII (Jt. Ex. No. 2, p. 13, Tr. 41, 100, 104, 106, 108, 110), the glaring statistical disparity between Blacks in the skilled jobs (2%) and Blacks in the area's labor force (39%), and the absence of evidence validating the skill experience requirements.

Despite all of this evidence and the undoubted awareness of the existence of the "smoking gun," Kaiser has insisted throughout this litigation that it was completely innocent of any wrongdoing. It has consistently attributed the statistical disparities in its craft jobs to the discriminatory acts of others, labeling such conditions "societal discrimination." Only the Union has pressed some

of these arguments of possible past violations, which it now has chosen to abandon.[26]

Amici believe that both the union and the employer have a substantial interest by their affirmative action programs to curtail liability for past discrimination and to eliminate the badges of slavery. Nonetheless,

> . . . [N]o litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. 563 F.2d at 231 (Wisdom, J., dissenting opinion).

Reliance on employers and unions to marshal any evidence of their own misconduct, much less convincing evidence, which may give rise to massive civil liability and warranted public criticism is wholly misplaced.

The revelation of past discrimination in this particular case should not cloud the fact that parties are more apt to do as Kaiser has done—proclaim their innocence and blame their sorry statistical patterns on discriminatory conduct of others. However, as argued in Section II, *amici* fully agree that "societal discrimination" (a concept included in the term "institutional discrimination" used by *amici*) occurs and undoubtedly contributed

[26] The Union argued in the court below that the statistics created a *prima facie* case of discrimination against Kaiser. (Brief of United Steelworkers of America on *Petition for Writ of Certiorari*, at 3, n. 2.)

to Kaiser's segregated work force. Kaiser's position may in fact be accurate with respect to other Kaiser operations or similar industrial employers. The consequences of a position which prevents voluntary action to overcome societal discrimination were well-stated by Judge Wisdom:

> In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities. Yet how many of the excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find crafts jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. *The result would be a wrong without a remedy.* 563 F. 2d at 235-236 (emphasis added).

The concept of societal discrimination is useful to describe the phenomenon whereby discrimination in one economic sector affects outcomes in another sector. It also encompasses the fact that present discrimination and the effects of past discrimination in employment, education, housing, and other areas of private and public life interact with one another. *See, e.g.*, U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). Its emphasis is on systems of discrimination and their resulting conditions, not on any need to identify individual entities which may legally be held responsible for causing those conditions.

When used in this sense, societal discrimination describes that kind of institutional discrimination which is

not subject to judicially compelled remedies—in Justice Wisdom's words, where "[t]he result would be a wrong without a remedy," 563 F.2d at 236. If this Court requires that some evidence of a legal violation be acknowledged to exist as a pre-condition for affirmative action, it would limit affirmative action to the scope of legal obligations: conditions that the law did not arguably *require* an employer to remedy, the law would not *permit* the employer to remedy voluntarily. The result would be to freeze societal discrimination into the social and economic order. The EEOC's guidelines, by eschewing any such limits on voluntary action, properly avoid erecting such barriers to the full implementation of the national commitment embodied in the Thirteenth Amendment.

D. EEOC's Guidelines on Affirmative Action, Issued Pursuant to Reorganization Plan No. 1 of 1978 and Executive Order 12067, Express the Interpretation of a Congressional Act by the Executive Branch and Should Be Accorded Great Judicial Deference.

As a result of the President's Reorganization Plan No. 1 of 1978 (43 Fed. Reg. 19807 (May 9, 1978)), reorganizing federal fair employment enforcement efforts, the EEOC has gained several new responsibilities and added authority, including replacing the Equal Employment Opportunity Coordinating Council (EEOCC).[27] EEOC's Affirmative Action Guidelines are the first action by the EEOC pursuant to its new powers.

[27] *Id.*, Reorganization Plan No. 1 of 1978, Section 6. The EEOCC, composed of the Department of Justice, Department of Labor, Civil Service Commission, Commission on Civil Rights and the EEOC, had been charged with responsibility for "developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency and eliminate conflict, duplication inconsistancy and competition," thereby improving the federal civil rights enforcement effort. 42 U.S.C. § 2000e-14.

In his message transmitting the reorganization plan to the Congress,[28] the President summarized its intent as follows:

> This plan makes the EEOC *the principal Federal agency* in fair employment enforcement . . . .
> It gives the Equal Employment Opportunity Commission— an agency dedicated solely to this purpose —*the primary Federal responsibility* in the area of job discrimination. . . . *Weekly Compilation of Presidential Documents* at 400, 404 (February 27, 1978) (emphasis added).

With respect to the abolition of the EEOCC and the transfer of its functions to the EEOC, the President stated:

> . . . [T]his plan places the [Equal Employment Opportunity] Commission at the center of equal employment opportunity enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's [fair employment] efforts. . . . Such direction has been absent in the Equal Employment Opportunity Coordinating Council. *Id.* at 402-403.

The absence of such leadership by the EEOCC on both substantive and procedural civil rights matters had caused the U.S. Commission on Civil Rights to call for the elimination of the EEOCC and the creation of a new body with the needed overall authority. United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974; Volume V, To Eliminate Employment Discrimination.* 617, 647-649.

The reorganization plan makes the EEOC the leader in setting and coordinating federal job discrimination laws. Its authority to do more than coordinate the fed-

[28] 5 U.S.C. § 906 provides that a reorganization plan goes into effect 90 days after its transmittal to Congress unless vetoed by either House of Congress.

eral fair employment effort is manifest in Executive Order 12067 (43 Fed. Reg. 28967 (July 30, 1978)), the Presidential decree implementing Reorganization Plan No. 1. Section 1-201 of this Order states that the EEOC "shall provide leadership . . . to the efforts of Federal departments and agencies" having equal employment opportunity enforcement responsibilities. Section 1-303 instructs these departments and agencies to "comply with all final rules, regulations, policies, procedures and orders of the EEOC." These formal grants of power are reinforced by Section 1-306, which empowers the EEOC to make budgetary recommendations to the Office of Management and Budget regarding "staff size and resource needs" of covered agencies. Consolidating EEOC's authority and providing for orderly decision-making in the event federal fair employment departments or agencies may disagree, Section 1-307 of the Executive Order creates a "dispute resolution mechanism" for taking disagreements to the Executive Office of the President. Section 1-307(a) stresses that this dispute mechanism "should be resorted to only in *extraordinary circumstances*" (emphasis added).

Pursuant to Executive Order 12067, drafts of the now final affirmative action guidelines were repeatedly circulated among and reviewed by government civil rights agencies before being adopted by the EEOC. *BNA Daily Labor Report*, September 19, 1978, at A-7; October 20, 1978, at A-6; December 11, 1978 at AA-1. Pursuant to Section 1-303 of Executive Order 12067, all federal departments and agencies must comply with its requirements.

These guidelines, therefore, are not only the administrative ruling of the agency charged with enforcing Title VII. They also declare fair employment law for the entire executive branch; they embody congressionally approved policy reasons demanding a coordinated and consistent executive fair employment enforcement effort; and they

state the executive branch's considered determination of the legislative history of Title VII and of its long practical administrative experience with enforcing fair employment laws.

Amici submit that the understanding of the amount of deference owed EEOC's judgments explained in *Gilbert* v. *General Electric Co.*, 429 U.S. 125 (1976), should be reexamined in light of the recent reorganization. Congress and the President gave EEOC civil rights leadership authority. That decision and EEOC's actions pursuant to it should be given "great deference". *Griggs* v. *Duke Power Co.*, *supra*, at 433-434; *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973); *Albemarle Paper Co.* v. *Moody*, *supra*, at 430-431. However, judged under even the restrictive (and as *amici* believe, outdated) standards in *Gilbert*, *supra* at 141-142, much less the more deferential (and now correct) standards in prior cases, the guidelines should get "high marks" (*Gilbert*, *supra* at 143).

Obviously, the guidelines are not "a contemporaneous interpretation of Title VII." *Gilbert*, *supra*, at 142. There was no need for affirmative action guidelines until those subject to Title VII began to realize in recent years that if they did not voluntarily act to correct conditions attributable to discrimination, they would be forced, potentially at great expense,[29] to take such corrective action in any event. The issuance of guidelines was appropriate only after the EEOC and the executive branch had acquired some experience in dealing with charges that those seeking to comply with Title VII were allegedly violating the very Act they were seeking to implement. The Guidelines were issued as soon as the

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[29] *Albemarle Paper Co.* v. *Moody*, *supra*, establishing the right to back pay even in the absence of bad faith, was decided only three and one half years ago, in June, 1975.

need became apparent and the executive branch could decide upon a comprehensive approach.[30]

Unlike other EEOC interpretations struck down by this Court in *Espinoza* and *Gilbert*, the affirmative action guidelines are consistent with—indeed, they even incorporate—the only pre-existing document which stated the position of the key civil rights enforcement agencies on affirmative action. Section 1608.4(c)(1) quotes the most important sections of the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies." 41 Fed. Reg. 38814 (September 24, 1976). There may exist other pronouncements issued by individual agencies stating views on the legality of affirmative action plants. To *amici*'s knowledge, however, no other pronouncements express the position of the principal civil rights enforcement agencies (the EEOC, the Department of Labor, the Civil Service Commission and the Department of Justice). While the 1976 policy statement is not nearly as comprehensive or specific as the 1979 guidelines, it is wholly consistent with the more definitive standards set forth in the guidelines.

The critical question with respect to the guidelines is their reading of the legislative purposes behind Title VII. Notably, these guidelines once again differ from other EEOC interpretations struck down by this Court. The affirmative action guidelines contain a reasoned and explicit statement of the fundamental purposes underlying Title VII. The administrative interpretations in *Espinoza* or *Gilbert* addressed discrete, limited areas. The guidelines at issue herein go to the very heart of the meaning of Title VII. This Court cannot equate the *Espinoza* and *Gilbert* situations of specific provisions

[30] A draft of the guidelines on this controversial issue was first released to the public in 42 Fed. Reg. 64826 (December 28, 1977) and subjected to extensive public comment.

having little legislative history with the definitive expression by the executive branch of its position on the overall purposes of Title VII.

The President, and by their consent to the reorganization, the Congress, have vested considerable new power in the EEOC. Their confidence in that agency and the real need for confidence in its judgments by the American public should be reflected in the great weight this Court should accord its guidelines promulgated pursuant to its Federal fair employment leadership authority.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the judgment of the court of appeals with instructions to the district court to dismiss the case.

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The *Affirmative Action Coordinating Center* (*AACC*) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled *AACC News*. It has installed a national telephone "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communication and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black Lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of the principle of reverse discrimination by the courts and the continued attacks on voluntary affirmative action

plans, as in *Bakke* and *Weber*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the right to initiate voluntary affirmative action plans to redress the effects of 400 years of racial discrimination, the goal of equal employment will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to cosponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (*CCR*) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Center for Urban Law, Wayne County Neighborhood Legal Services*, represents persons in the Detroit metropolitan area. Its client population is composed of numerous racial and ethnic minorities unable to afford the price of conventional legal services. Many of its clients are non-white and the historical victims of societal and institutional racism. A large percentage of them are unemployed, underemployed, and frustrated by the employment market. Voluntary affirmative action programs

of the nature instituted by the appellants have aided this client population by opening a small avenue to secure employment and other benefits. To withdraw the benefits of these affirmative action plans just as small yet significant gains are occurring will have a devastating effect on them.

The *Affirmative Action Coalition of Chicago* is a coalition of minority and non-minority workers, students, professionals, and community people. Its goal is to build a broad affirmative action coalition within Chicago to educate and organize people to fight for equal rights in employment, education and community services. The *Weber* case has particular significance to Chicago since it has the largest concentration of steelworkers in the country and the largest percentage of minorities of any union district in the United Steelworkers of America. The Affirmative Action Coalition of Chicago sees the importance of extensive legal, as well as general political work in the fight around the issues in the *Weber* case. It firmly supports the belief that all forms of racial discrimination must be eradicated as remnants of slavery.

The *Affirmative Action Coalition of San Diego* (*AAC*) is a group of individuals and organizations that evolved out of the anti-Bakke movement. It has been involved in educating the community and the labor force about the *Bakke* decision and pending *Weber* case. The AAC of San Diego's position is that affirmative action in employment and education is legal and must be defended and expanded. It is administering a survey to over 60 organizations and institutions to determine the effect in San Diego of the *Bakke* decision.

The *American Association for Affirmative Action*, a non-profit organization, was founded in 1974. Men and women from protected and unprotected classes, corporations and educational institutions, representing both the public and private sector, work together through the

Association for effective affirmative action/equal opportunity in employment and education nationwide. As a national organization of professionals in the field of affirmative action/equal opportunity, the Association strongly endorses and supports the concept of voluntary affirmative action. It recognizes this vehicle as an essential tool in overcoming the effect of systematic discrimination and exclusion.

The *Black American Law Students Association (BALSA)* is the representative organization of Black law students in the nation.

The purpose for which BALSA was formed is to articulate and promote the professional needs and goals of Black American Law Students: to influence American law schools, legal fraternities and associations to use their expertise and prestige to bring about change within the legal system in order to make it responsive to the needs of the Black community. In keeping with this purpose, BALSA supports the maintenance of affirmative action programs within education and employment. Recognizing the reality that most Black Law Students are the products of affirmative action admissions programs, BALSA actively endorses programs that insure their employment. It is with this interest that BALSA has chosen to participate in an Amicus Brief that argues the legality of the voluntary affirmative action employment program as exemplified in the *Weber* case.

Black Economic Survival (BES) is a community-based organization that seeks jobs for minorities in the construction industry in the New York metropolitan area. BES joins this brief because it is acutely aware of the exclusion of Black and other minority workers from skilled jobs in the construction industry and elsewhere and from access to the training necessary to obtain such jobs. BES believes that affirmative action training programs such as that instituted at the Kaiser Gramercy

plant are essential if Blacks and other minority workers are ever to obtain access to skilled craft jobs. Without such programs, Blacks and other minority workers, who have for 200 years been the victims of a racist society, will continue to be excluded from a large segment of employment opportunities and from obtaining necessary skills.

The *Center for United Labor Action (CULA)* is a national organization devoted to the furtherance of unity and solidarity in the labor movement. Its members are trade union officials, rank and file workers, unemployed persons and activists in the community. The CULA, through its individual members and as an organization, has participated in fighting for affirmative action programs throughout industry. In 1972, the CULA was named a Party of Interest in one of the first major affirmative action battles in industry. In proceedings before the Federal Communications Commission on behalf of many telephone workers and the public, AT&T was charged with race and sex discrimination. The CULA strongly objects to the dangerous interference of the lower courts into the collective bargaining process of the United Steel Workers with Kaiser Aluminum. The *Weber* decision below infringes upon the right of a union to enter into negotiated agreements that are fully consistent with the spirit and needs of the union movement and its members. In defending the Gramercy program the United Steel Workers of America is upholding its own constitution and its obligation to represent all of its members. The present decision clearly endangers the right of the union to carry out the mandate of its constitution.

The *Charles Houston Bar Association of Oakland, California,* is a bar association of Black attorneys in Northern California which promotes the interests of justice and equality for all people. The Association joins

this brief in order to express its interest in ensuring that voluntary affirmative action programs are upheld throughout the country.

The *Christian Church (Disciples of Christ)* is a protestant denomination of some 1.2 million members. Through the resolutions of its General Assembly and the work of the Department of Church in Society, it has long been involved in social ministries in the fields of human relations and civil rights. On a number of occasions it has joined with others in filing *amicus curiae* briefs arguing for the rights of all persons before the law.

The *Church and Society Network, Inc.* is an independnt society of Episcopalians and other Christians involved in carrying out the Church's social mission in over 20 metropolitan areas in the United States. Church and Society Network joins as an *amicus* because its daily contact with ghetto neighborhoods makes it acutely aware of the physical and emotional devastation caused by the lack of employment opportunities for non-whites and women in this country, pointing to the urgent need to support all voluntary affirmative action efforts.

Church Women United (CWU) is an ecumenical movement of Protestant, Roman Catholic and Orthodox women seeking to witness for Christ in the church and in the world. CWU's support for affirmative action in order to achieve equal employment opportunity is validated not only by the United States Constitution, but by its commimtent to justice as religious women of fatih.

The *Coalition of Black Trade Unionists (CBTU)* is an organization consisting of representatives from 57 international and national unions with 27 chapters located across the country. CBTU filed an *amicus curiae* brief with this Court in the *Bakke* case. CBTU joins as an *amicus* in this brief because it considers that the *Weber* case has a tremendous potential adverse impact on af-

firmative action employment programs established for Blacks, other minority workers, and women across the country. CBTU especially supports the Thirteenth Amendment analysis taken in this brief because of its knowledge of the daily experience of its members, who suffer the impact of this country's two hundred years of racial discrimination.

The *Delta Ministry*, which functions in Mississippi, is a related movement to the National Council of Churches and is affiliated with the Divison of Church and Society. The Delta Ministry is involved in community development efforts, human rights, and educational and economic justice issues with the poor and Black communities in the state of Mississippi. The Delta Ministry joins as an *amicus* because its 15 years of involvement in economic justice issues, particularly in the struggle for equal employment rights for all Americans and especially those in the State of Mississippi, has demonstrated that affirmative action programs are essential if the badges and indicia of slavery are to be overcome in the area of employment.

Equal Opportunity Forum is a national equal rights publication reporting on classes protected by federal and state anti-discrimination laws. *Equal Opportunity Forum* joins as an *amicus* because of its understanding of the necessity for affirmative action programs including those of a voluntary nature, such as the one at issue in the *Weber* case. It considers these programs to be essential vehicles for the implementation of equal employment opportunities.

The *Farm Labor Organizing Committee (FLOC)* is a farm worker's union and community organization dealing primarily with Chicanos in northwestern Ohio, eastern Indiana, and southern Michigan. It is FLOC's experience that Chicanos and other minorities suffer from staggering rates of unemployment and underemployment.

FLOC joins as an *amicus* because it believes that an elimination or weakening of affirmative action programs would increase the suffering of Chicanos and other minorities who have extreme difficulty meeting the basics of life. FLOC is especially concerned about the thousands of farmworkers displaced by mechanization. Without affirmative action programs to increase the number of minorities employed generally, even fewer jobs would be available to these workers.

Filipinos for Affirmative Action, Inc. is an Oakland, California, based organization which seeks to accomplish the following goals and objectives: 1) to promote and project Filipino interests on all aspects of life that affect the general well-being of Filipinos; 2) to identify and evaluate the educational, social, and economic problems of Filipinos with the view to helping find appropriate relief and solutions; 3) to provide information and referral services to new immigrants, unemployed Filipinos, youth, and other segments of the Filipino community; 4) to encourage and assist in developing and implementing, in cooperation with appropriate agencies, affirmative action programs, and other such programs as well and better equip themselves toward attaining self-sufficiency; 5) to encourage and facilitate the greater exchange, compilation, and distribution of information concerning Filipinos on local, state, and national levels.

The *Health Coalition for Affirmative Action* is a New York based group of health professionals and health and civil rights organizations working to preserve and enlarge affirmative action programs in medical and nursing schools. The Health Coalition for Affirmative Action joins as an *amicus* in this brief recognizing the interdependence of affirmative action programs in employment and in education.

The *Indian Law Resource Center* is an educational and charitable organization based in Washington, D.C.,

devoted principally to the protection and enhancement of the legal rights of American Indians. One of the purposes of the Center is to seek the elimination of racial discrimination through education and legal efforts. Essential to this effort is the concept of "special measures" and affirmative action. For many years the federal government has established and implemented, albeit imperfectly, the policy of "Indian preference" regarding employment of Indian persons by various federal agencies. The Center is vitally interested in the protection and continuing affirmation of the Indian preference policy and other measures, such as affirmative action, designed to overcome the continuing social and economic discrimination experienced by American Indians and other nonwhite people.

The *Interreligious Foundation for Community Organization (IFCO)* is a public, charitable foundation whose 37 member board represents a cross-section of religious, educational and grass roots organizations. From its inception twelve years ago, its purpose has been to support programs to alleviate discrimination and to empower the poor. Recognizing that underrepresentation of minorities and women has a two hundred year history, a major focus of IFCO has been the implementation of strategies to combat institutional racism. The Board has consistently supported efforts to this end, including filing an *amicus curiae* brief in *Bakke*. It urges the Court to uphold all voluntary programs of affirmative action.

La Raza Legal Alliance (LRLA), is a national organization composed of Latino lawyers, law students and legal workers dedicated to the realization of social, economic, and political equality for all Latinos. Its goal is to promote and to protect the rights of Latino people and thereby, all peoples, to a decent standard of living, a high quality of education, decent housing and equal employment opportunities.

Labor Research Association, Inc., was formed in 1927. The purposes of the organization are to conduct investigations and studies of social and economic questions. It publishes its findings in the form of reports, articles, pamphlets and books. Labor Research Association joins as *amicus* in this brief because of its belief that the *Weber* case represents a significant challenge to affirmative action programs so necessary to achieve equality for all Americans.

Law Students Civil Rights Research Council (LSCRRC), is a law student organization which seeks to respond to the needs of minority and poor people in all areas of the United States. Since its inception in 1963, it has assisted the efforts of every major civil rights, civil liberties, and public interest law organization. In 1976, the LSCRRC Board of Directors mandated a sharper organizational focus on the problems surrounding affirmative action/minority admissions. The theme for its National Convention in October, 1978, was the "Crisis in Minority Admissions." It has also co-sponsored two regional minority admissions conferences during the 1976-77 year, and has sponsored several LSCRRC interns working on projects concerning affirmative action in the last two summers.

The *Legal Services Staff Association (LSSA)* is a labor organization that represents all non-managerial employees of Community Action for Legal Services in New York City. It understands the need for affirmative action because in their work its members daily witness the devastating effects on human beings of sexism and racism in our society. LSSA has a long held commitment to support affirmative action programs and policies. LSSA joins as an *amicus* because of its deep concern about the adverse repercussions that would result from a decision by this Court which does not fully support and encourage voluntary as well as court-ordered affirmative action programs.

Movimiento de Izquierda Nacional Puertorriqueño (M.I.N.P.-El Comite) is an organization composed predominantly of Puerto Ricans and other Latins dedicated to social change for the achievement of equality and full democratic rights. Affirmative action for minorities and women is one means, but a vital one, for overcoming the effects of centuries of discrimination and prejudice in this country. El Comite views the action brought by Weber as a serious threat to these efforts, having repercussions in the area of employment as well as housing, education, health care, and other vital areas of concern to the community that it serves.

The *National Ad Hoc Committee of Black Steelworkers (Ad Hoc)*, a national organization, has been deeply involved in fighting discrimination in both the steel industry and its own union, the United Steelworkers.

Ad Hoc has been an integral part of this struggle, leading to most of the key federal court decisions involving discrimination in the steel industry. Ad Hoc has filed hundreds of discrimination charges against steel companies which led to a consent decree in their industry. Ad Hoc commends all parties who are struggling in support of affirmative action. It joins as *amicus* in the hope that this brief will help the Court understand the necessity of speaking out in support of the affirmative action program under attack and lend its support in eradicating the badges and indicia of slavery.

Ad Hoc, an organization shaped, formed and grounded in the struggle of Black steelworkers, urges the Court not to stop the programs of social and economic reconstruction. They know from bitter experience that without the support of the courts, promises are made only to be a force for fundamental change in the system of all patterns in our free society which oppress or which give rise to the oppression of Blacks, minorities and women. Oppression refers not only to the economic, social and

political disenfranchisement. It is a disenfranchisement of the mind, the spiritual and moral values that hold together the fabric of a nation. By emancipating Blacks, women and other minorities from the effects of white racism, the Court thus provides authentic freedom for both white and Black people. The Court must not once again move through history ignoring the realities, and hiding these painful truths behind a facade of myths and real and imagined anxieties. Ad Hoc believes the task of the Court is to analyze the nature of this enormous problem in the light of the oppressed people in our free society.

The *National Alliance Against Racist and Political Repression* (*NAARPR*) is a broad based coalition of Church, civic, community, student and professional groups formed in 1973 to fight against repression, in its myriad forms. The NAARPR appears here because of its conviction that should the case of *Weber* v. *Kaiser Aluminum* be upheld, private programs across the U.S., designed to equalize the employment of Blacks, Native American, Asian American, Hispanic American and other minorities, will be virtually eliminated. Further, NAARPR believes that the immediate result of upholding *Weber* would be increased unemployment and further victimization of minority people. Current patterns and practices of police conduct will result in increased arrest of these unemployed citizens and further swell this nation's jails and prisons with numbers all out of proportion to minority representation in the population.

The *National Association of Social Workers* is a non-profit, national organization of professional social workers. It is devoted to the advancement of sound public policy for social work consumers as well as its 80,000 professional members. It joins as an amicus because it has voluntarily adopted an association-wide affirmative action program for women and minorities which would be threatened by any adverse holding in the *Weber* case.

The *National Bar Association* (*NBA*), 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization representing more than 7,000 Black attorneys, judges and law students in the United States. The NBA was founded to achieve equalization of opportunities for minorities in the legal profession and to further the goal of equal justice for all.

Thus far, affirmative action has proven to be the most effective method for ameliorating the gross underrepresentation of minorities in the legal and other professions, and certainly has been the most critical factor in doubling the number of Black attorneys in America in the past decade. The NBA believes that this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination. The NBA interprets affirmative action to mean those programatic efforts designed to fully integrate minorities and women in this country into employment, entrepreneurship and education. With the advent of the "reverse discrimination" principle, Blacks and other minorities stand to lose the gains that have been made through the use of affirmative action.

Legal actions, such as *Weber* and other cases, have dampened the efforts of employers and unions who are attempting to redress a national pattern of discrimination as mandated in Title VII and Executive Order 11246. Further approval of the reverse discrimination principle by the United States Supreme Court will not only impede, but will totally destroy the gains accomplished to date.

The *National Black Political Assembly* (*NBPA*) is a national, independent, Black political organization with chapters in 20 states. It is devoted to voter registration, political education campaigns, and the formulation of resolutions and positions on issues which affect the national Black community. It provides skill development training in various areas of electoral politics and community struggles, education, economics and other categories of knowledge and work as may be required to fulfill the goals of the

NBPA. The NBPA believes that affirmative action is essential to guarantee access to skilled jobs for those minorities who have traditionally been denied access to equal opportunity within American society, especially in the skilled crafts. The failure to maintain vigorous affirmative action programs in the skilled crafts would not only stymie progress in this area, but would offer an opportunity for those who are opposed to the entry of minorities into the skilled crafts on an equal basis to maintain and increase barriers which have been used traditionally to discriminate.

The *National Black United Fund* (*NBUF*) is a nonprofit, tax-exempt organization founded to increase the amount of charitable contributions targeted for organizations serving the black community. The local affiliates of NBUF raise funds through payroll deductions and will be adversely affected if there is any reduction in voluntary affirmative action plans which will produce a significant decline in black employment in predominantly white industry.

The *National Committee to Overturn the Bakke Decision* is a multi-racial organization, formed in April, 1977, to publicize the issues presented by racism and the *Bakke* decision. The NCOBD is comprised of community agencies, church groups, students, women's organizations and working people who organized to demand the reversal of the *Bakke* decision. Educational brochures, pamphlets, and leaflets were written to press the need for affirmative action and the need for people actively to take up the struggle against racism. In the aftermath of the *Bakke* decision, the NCOBD is continuing the struggle against racism and resolutely supports affirmative action plans in employment.

The *National Council of Churches of Christ* in the United States of America (*NCC*) is the cooperative agency of thirty national Protestant and Eastern Orthodox religious denominations with an aggregate membership of over forty million people. It is organized exclusively for

religious purposes and is committed to promoting the application of the law of Christ in every sphere of human relations.

The Council has been active in the civil rights effort since its inception in 1950 and has filed briefs *amicus curiae* with this Court in several historic cases, including *Jones* v. *Mayer* (1968) and *Regents* v. *Bakke* (1977). Because its Governing Board has repeatedly supported affirmative action to eliminate the disadvantage engendered by discrimination, the Council joins this brief to urge the Court to uphold voluntary programs of affirmative action in employment.

The *National Emergency Civil Liberties Committee* (*NECLC*) was founded in 1951 for the purpose of reestablishing the constitutional freedoms then under severe attack. For 27 years, NECLC has pursued this goal through numerous test cases to vindicate the civil liberties and civil rights of citizens, including many such cases before this Court. It has also engaged in extensive educational activities in support of the constitutional rights of citizens.

The *National Employment Law Project, Inc.* (*"The Project"*) is a legal services organization which provides backup assistance to local legal services offices in all areas of employment law. In conjunction with these local offices, and in some instances on its own, the Project represents a number of individual clients in employment discrimination litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as well as constitutional and other statutory provisions.

Since its inception in 1969, the Project has been involved in efforts to combat the effects of racial discrimination in employment. It believes that progress in civil rights depends primarily upon the voluntary efforts of public and private organizations to rectify the widespread

effects of racial discrimination. Societal discrimination is so pervasive that litigation alone cannot be relied upon to protect the rights of racial and ethnic minorities. The Project has been involved in the creation of numerous affirmative action programs voluntarily and involuntarily adopted by private employers and public agencies that use racial classifications to remedy racial discrimination. Affirmance in this case would seriously jeopardize, if not destroy, these and future programs, to the severe detriment of the Project's minority clients.

The *National Organization of Legal Service Workers* (*NOLSW*) is a national organization open to all non-managerial employees of the Legal Services Corporation. NOLSW supports affirmative action within Legal Services offices, in employment generally, and in all other areas. NOLSW joins as an *amicus* because it believes that all affirmative action programs including voluntary ones are legal when designed to overcome the long history of discrimination against minorities and women in this country.

The *National Puerto Rican Law Students Association* (*National PRLSA*) is the organization established by Puerto Rican and other Latino Law students to represent the concerns and needs of their people before the national legal and educational communities. National PRLSA is specificaly committed to the increased recruitment and admission of Puerto Ricans and other Latinos into law schools, the strengthening of its local organizations at all law schools, and the development of positive working relationships with Latino lawyers, legal workers, community organizations and undergraduate groups across the nation. National PRLSA's specific concerns emanate from its solidarity with the struggles of all minority, poor and underrepresented people of the United States to attain and preserve full socio-economic and political equality.

The *New American Movement* is a nationwide democratic socialist organization which sees the struggle for

socialism integrally linked to the struggle for democracy and to the struggle for the special needs of women and minorities. It sees equality for women and minorities as essential to democracy and to the making of any progress in the lives of the American people as a whole. It joins as *amicus* in this *brief* because of its understanding of the importance of voluntary affirmative action as a step in gaining needed equality to provide better working and living conditions for all people.

The *New Jersey Association for Affirmative Action in Higher Education*, through its executive committee, confirms its interest in affirmative action by joining as an *amicus* in this brief (*Weber* v. *Kaiser Aluminum*) and encourages the United States Supreme Court to overturn both lower courts' decisions in order to allow voluntary affirmative action programs, including quotas without the necessity of an admission of past employment discrimination practices, a consent decree worked out through a government agency and/or a court finding of past employment discrimination.

The *New Jersey Association of Black Educators* (*NJABE*) has existed since 1973 and includes in its membership Black educators, students, and parents from throughout New Jersey. The NJABE is committed to developing and maintaining involvement in educational policymaking and implementation so that Blacks may enjoy greater educational and employment opportunities. The NJABE's interest in the *Weber* case is great because educational opportunity is rendered void without accompanying opportunities for employment in every facet of American society.

The *People's Alliance* is a national network of groups and individuals working to defend the achievements reached in struggles by working people and to build towards a society based on justice and full equality. Many of the people in this network are working women or mi-

nority people, some of whom got their current jobs because of affirmative action programs. In addition, all members and member organizations of the People's Alliance believe that an upholding of the claims of Brian Weber would serve the interests of the racist, sexist, right-wing forces which are working to roll back the gains of the civil rights, women's, and labor movements—gains which are just the first small steps in what should be a process of bringing justice and equality to all people in this land.

Philadelphia Area Project on Occupational Safety and Health (*PHILAPOSH*) is a non-profit corporation which unites labor, health, and legal workers to act for improvements in health, safety and environmental conditions for all workers in the Delaware Valley. It has traditionally supported affirmative action programs to overcome the effects of past discrimination against minority workers. Employment discrimination not only concentrates minority workers in the most hazardous and dangerous jobs, it is also a source of intense stress affecting all workers both on and off the job. Such stress is known to be a direct cause of illness and an indirect cause of occupational injuries. The elimination of employment discrimination, therefore, not only contributes to the achievement of a more democratic society, but also contributes toward the goal of improving the health and safety of workers on and off the job. For these reasons, PHILAPOSH has a special interest in joining with others to present an *amicus* brief to the Supreme Court in support of voluntary affirmative action employment plans.

The *Puerto Rican Socialist Party* (*PSP*) is a registered political party in Puerto Rico with active chapters in all major cities of the United States where there is a substantial Puerto Rican population. The United States Branch of the PSP seeks to organize Puerto Rican workers in the United States with the principal objective of obtaining the liberation of Puerto Rico and the establish-

ment of a socialist republic. Additionally, the PSP supports and participates in all those economic, social and political struggles in the United States which may contribute to the achievement of full democratic rights and the establishment of a Socialist form of government in the United States. In this context, the PSP views affirmative action as a modest victory of the working class, women, and racial and other minorities in their struggle toward total liberation. The PSP is vehemently opposed to any action such as the *Weber* case which might jeopardize these hard won rights.

Southerners for Economic Justice (*SEJ*) is an organization of prominent public citizens living throughout the South. It has offices in Knoxville, Tennessee, and Greenville, South Carolina.

SEJ was formed because of a conviction that economic rights can only be insured by extending the protection of our civil rights to the work place. In the South, SEJ has been active in community education, advocacy, and in monitoring race and sex discrimination on the job.

The *Southern Regional Council* is a non-partison, privately funded research and action organization founded in 1944. Composed of a 120 member bi-racial governing board drawn from eleven states, the council is working to eliminate institutional racism and poverty by making the region's own institutions more accountable to all the people they are supposed to serve. The Council accomplishes its work through a small core staff and special project staffs that analyze issues, monitor government responses to these issues, and document and publicize their findings in order to increase citizen awareness of and influence on public policy at the national, state, and local levels.

Teamsters for a Democratic Union (*TDU*) is a national rank and file group of Teamster Union members

and their spouses. TDU's purposes are to strengthen and democratize the ineffectual and corruption-ridden International Brotherhood of Teamsters. Consisting of some 3100 members nationwide, TDU has chapters or members in 45 Teamster locals. At its founding convention in 1976, TDU adopted resolutions strongly favoring affirmative action for both women and blacks in the trucking industry. As in the skilled trades, with union acquiescence, the trucking industry has long excluded women and minorities from the most favored jobs. TDU believes that past and present discrimination must be remedied at the employer's expense. It is employers in general who have been responsible for and have benefitted from discrimination. The affirmative action plan adopted by Kaiser in this case implements that position. At the 1978 national TDU convention, attended by 500 Teamsters, a resolution was unanimously passed on the floor mandating TDU to join in this proceeding as *amicus*, and to generally publicize the issues of this case.

The *Texas Farm Workers Union* (*TFU*) is an independent, unaffiliated union of farm workers in the Rio Grande Valley of south Texas, primarily composed of Mexican farm workers. It is currently attempting to secure the passage of legislation in the state of Texas which would allow farm workers to bargain collectively. The Union is vitally interested in the outcome of the *Weber* case because its members are the victims of discrimination as were the minority workers in the Gramercy, Louisiana area. Furthermore, most of the working population of the Rio Grande Valley are Mexicans. They, like the members of TFW, are discriminated against in all areas of their lives.

The *Transit Workers in Coalition, Inc., The Committee, the Revenue Collector's Benevolent Association*, the *Coalition of Concerned Transit Workers*, the *Coalition of Signal Maintainers* and *The Committee of Concerned*

Transit Workers are the major rank-and-file groups within *Local 100 of the Transport Workers Union of America, AFL-CIO*. Our local, which is multinational, has 33,000 members of whom 27,000 are employed by the New York City Transit Authority. We are united in our support of the affirmative action plan at stake here and the many similar plans which will be affected by this Court's ruling.

The Kaiser plan is but a small step toward remedying the discrimination to which minority workers have historically and currently been subjected. Our groups believe in justice for all workers and in the unity of all workers fighting for better conditions for all. Voluntary affirmative action plans are a concrete step toward equality between workers of different nationalities. It is this equality which lays the basis for the unity of workers of different nationalities. Thus affirmative action programs, far from discriminating against white workers, in the long run help white as well as minority workers.

The *United Church of Christ Commission for Racial Justice* has been actively involved in this struggle for civil and human rights since the 1960s. It has been actively involved in such cases as the Wilmington 10 and the Charlotte 3. It vigorously opposes this Court's decision in the *Bakke* case, a ruling which is producing devastating effects in the minority community. As the Commission has analyzed the present pending *Weber* v. *Kaiser Aluminum* case, it is convinced that this is simply another effort to set back the gains made in the civil rights area, with the focus now on employment.

The Commission joins in the filing of this *amicus* in the hope that this Court will have a sense of justice and foresight found lacking in the *Bakke* decision. We are firm in the belief that there are strong Thirteenth Amendment arguments in favor of the reversal and dismissal of this case.

The *United Coalition* is an organization of members of Local 51 of the United Auto Workers (UAW) committed to building more aggressive representation and equality for all in the union and work force. The struggle for equality is a prime interest of the United Coalition. The group has struggled in local level contract negotiations for strong affirmative action programs for entrance to the skilled trades for women, Blacks, and Arab workers. The Coalition has called for strict enforcement of existing affirmative action programs. It has advocated strict enforcement of transfer rights which gives priority to in-plant workers over new hirees resulting in improved jobs and advancement potential for women and minorities. United Coalition feels the *Weber* case poses a threat to all existing affirmative action programs.

The *United Construction Workers Association (UCWA)* is a rank and file workers' organization based in Seattle, Washington, representing Black and other minority workers in the building trades. The UCWA seeks out minority workers with potential employment discrimination problems, educates them about their rights under federal and state civil rights and labor laws, and, where necessary, initiates and sponsors law suits on behalf of its members to remedy discriminatory employment patterns. UCWA has always supported affirmative action in all forms as necessary to get rid of the badges and indicia of slavery.

Western Center on Law and Poverty is a public interest law firm representing low income clients throughout California. One of the highest priorities established for the Center by its client community during the past several years has been in the area of employment and affirmative action. In meeting that priority, the Center has litigated many cases which have resulted in the establishment of affirmative action programs for women and minorities, programs that will now be directly affected by the decision in *Weber*. The Center also filed

two briefs as *amicus curiae* in the *Bakke* case, reviewed and decided by the Supreme Court during its last term.

The *Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division)* is the national expression and policy making body of United Methodist Women. It is a mission organization formed more than 100 years ago to offer women opportunities for service from which they were excluded by the prevailing custom and official policy of the Church at that time. It has a long tradition of concern for the interests of women and children and especially of minority groups, and supports programs throughout the world. It has always supported the effort to extend full civil rights to all United States citizens. The Women's Division joins as an *amicus* because its program and policy supports and is consistent with the position taken in this brief.

Women for Racial and Economic Equality (WREE) is a multi-racial and multi-national organization with chapters in 25 cities. Its membership is mainly working class and low income women. It is concerned with those necessary actions and legislation that will enable women to achieve economic equality as the foundation for true social and political equality. The elimination of racism is basic to this effort since it is used to prevent unity among women who have the same needs, aspirations, and goals. Affirmative action is the operational base for any attempt to achieve economic parity for women and minorities. WREE believes that affirmative action must be expanded to include laws and regulations that enable women to get and *keep* jobs. This would mean day care, pregnancy and maternity benefits, health protection, etc. Minimum quota guidelines for hiring must be protected to make affirmative action meaningful.

The *Women's Law Project* is a non-profit, feminist, legal organization in Philadelphia, Pennsylvania. It is

working for the legal equality of men and women through litigation, public education, research and the representation of organized women's groups. Since its inception in 1974, the Project has been concerned with the implementation of constitutional principles of equality and of civil rights statutes. Its goal is to use these laws to effectuate a just transaction to a system in which the legal rights and obligations of both sexes are fully and equally recognized in all areas of life. Within these purposes, it has been particularly concerned about advancing opportunities for women in employment. The Project has been involved as counsel or *amicus* in a number of lawsuits aimed at opening up equal opportunities and benefits for women workers. Through this work, it has become aware of the critical role that voluntary affirmative action efforts in the workplace must play if women and minorities are to achieve their rightful place within the labor market.

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 435 and 436

KAISER ALUMINUM AND CHEMICAL CORP., *et al.*,

Petitioners,

—against—

BRIAN F. WEBER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, INC., AND ASIAN AMERICANS FOR EQUALITY AS *AMICI CURIAE*

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Cases:

Asakura v. City of Seattle, 265 U.S. 332 (1924) 13

Brown v. Board of Education, 347 U.S. 483 (1954) 8

Chinese for Affirmative Action v. Federal Communications Comm'n, 16 E.P.D. ¶ 8290 (D.C. Cir. 1978) 27

Cockrill v. California, 268 U.S. 258 (1924) 13

Crawford v. Board of Education, 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976) 21

Domingo v. New England Fish Co., 445 F. Supp. 421 (W.D. Wash. 1977) 28

Frick v. Webb, 263 U.S. 326 (1923) 13

Gaston County v. United States, 395 U.S. 285 (1969) 46

Gong Lum v. Rice, 275 U.S. 78 (1927) 19

Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971) 17,21

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Hernandez v. Board of Education of Stockton Unified School District, Civ. Act. No. 101016, San Joaquin Super. Ct. (Oct. 9, 1974) 22

Hiatt v. City of Berkeley, 149 Cal. Rptr. 155, 85 Cal. App.3d 29 (Cal. Ct. App. 1978) 44

Hirabayashi v. United States, 320 U.S. 81 (1943) 14

Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) 28

Korematsu v. United States, 323 U.S. 214 (1944) 14

Hull v. Cason, 47 U.S.L.W. 2416 (Cal. Ct. App., Dec. 26, 1978) . 44

In re Ah Yup, 1 F. Cas. 223 (C.C. Cal. 1878) 15

In re Hong Yen Chang, 84 Cal. 163 (1890) 13

In re Yamashita, 30 Wash. 234, 70 P. 482 (1902) 13

Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 875 (1963) (en banc) 21

Page

Johnson v. San Francisco Unified School District, 339 F. Supp. 1315 (N.D. Cal. 1971), app. for stay denied, Guey Heung Lee v. Johnson, 404 U.S. 1215 (1917), vacated and remanded, 500 F.2d 349 (9th Cir. 1974) 20,21

Kelsey v. Weinberger, 498 F.2d 701 (D.C. Cir. 1974) 21

Lau v. Nichols, 414 U.S. 563 (1974) 21

Martinez v. Bechtel Corp., 10 E.P.D. ¶ 10,570 (N.D. Cal. 1975) 28

Mendez v. Westminster School District, 64 F. Supp. 544 (C.D. Cal. 1946), affirmed, 161 F.2d 744 (9th Cir. 1947) 19

National Organization for Women v. Bank of California, 5 E.P.D. ¶ 8617 (N.D. Cal. 1973) 28

Officers for Justice and United States v. City and County of San Francisco, N.D. Cal. C-73-0657-RFP, C-77-2884-RFP ... 27

Oyama v. State of California, 332 U.S. 633 (1948) 15

Ozawa v. United States, 260 U.S. 178 (1922) 16

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People v. Hall, 4 Cal. 399 (1854) 14

People v. San Diego Unified School District, 19 Cal.App.3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971), cert. denied, 405 U.S. 1016 (1972)..... 21

Railway Mail Association v. Corsi, 326 U.S. 88 (1945) 51

San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971) (en banc), cert. denied, 401 U.S. 1012 (1971) 21

Saunders v. Naval Air Rework Facility, N.D. Cal. Civ. Action No. C-74-0520 (1978) 28

Slaughter House Cases, 83 U.S. 36 (1873) 47

Soria v. Oxnard School District Board of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974), on remand from 488 F.2d 577 (9th Cir. 1973) 21

Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Cal. 1970) 21

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Speer v. See Yup, 13 Cal. 73 (1855) 14

Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) 15

Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885) 18

Terrace v. Thompson, 263 U.S. 197 (1923) 13

The Chinese Exclusion Case, 130 U.S. 581 (1889) 15

United Pilipinos for Equal Employment v. California Blue Shield, N.D. Cal. Civ. Action No. C-73-1085-CBR (Nov. 4, 1974) ... 27

United States v. City of San Diego, S.D. Cal. 76-1093 (1977) 27

United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972) 26

United States v. Wong Kim Ark, 169 U.S. 649 (1898) 15,48

University of California Regents v. Bakke, ___ U.S. ___, 57 L.Ed.2d 750 (1978) 20,23,48,49,50

Page

Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, 17 E.P.D. ¶ 8518 (9th Cir. 1978) 27,28

Ward v. Flood, 48 Cal. 36 (1874) . 18

Webb v. O'Brien, 263 U.S. 313 (1923) 13

Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975) 28

Wong Him v. Callahan, 119 F. 381 (C.C. Cal. 1902) 19

Yamashita v. Hinkle, 260 U.S. 199 (1922) 13

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 6,13,46,47

Statutes and Regulations:

Emergency School Aid Act of 1972, 20 U.S.C. § 1619(9)(A) 22

Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq. 16

Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1151-1156 16

Philippine Independence Act, 48 Stat. 456 (1934) 16

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Cal. Const. of 1879 art. XIX, §§ 2-3 12

Cal. Const. of 1879 art. II 14

Idaho Const. of 1890 13,14

Miss. Const., art. 14, § 263 (1942) 14

Foreign Miners' License Tax, Act of Apr. 13, 1850, ch. 97, §§ 1 et seq., 1850 Cal. Stat. 221 ... 12

1860 Cal. Stats., ch. 329, § 8 17

1863 Cal. Stats., ch. 159 17

1885 Cal. Stats., ch. 117, § 1622 18

1893 Cal. Stats., ch. 193, § 1662 18

1929 Cal. Stats., ch. 685, § 1 ... 18

1947 Cal. Stats., ch. 737, § 1 ... 19

General School Law of California, § 1662 (1880) 18

Miss. Code Ann. § 459 (1942) 14

Mont. Rev. Codes Ann. §§ 5701, 5702 (1935) 14

S.D. Code § 14.0106 (1939) 14

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Utah Code Ann. § 40-1-2 (1943) 14

28 C.F.R. Pt. 42, subpt. F 25

28 C.F.R. Pt. 42, subpt. E 25,44

28 C.F.R. ch. I, pt. 50, § 50.14 .. 25

29 C.F.R. pt. 1602 25

29 C.F.R. pt. 1608 44,50,51

41 C.F.R. pt. 60-2 and 60-4 25,43

41 C.F.R. § 60.50.1(d) 43

Other Authorities:

F. Auerbach, Immigation Laws of the United States (1955) 15

California State Advisory Comm., U. S. Comm'n on Civil Rights, Asian Americans and Pacific Peoples: A Case of Mistaken Identity (1975) 22,37

California State Dept. of Education, Racial and Ethnic Survey of California Public Schools Fall 1966 (1967), Fall 1968 (1969) and Fall 1970 (1971) 20

P. Chiu, Chinese Labor in California, 1850-1880 (1967) 9

Page

F. Chuman, The Bamboo People: The Law and Japanese Americans (1976) 11,12,15

117 Cong. Rec. 32096 (1971) 24,26

117 Cong. Rec. 32094 (1971) 24

118 Cong. Rec. 294 (1972) 24,49

118 Cong. Rec. 4933 (1972) 25

M. Coolidge, Chinese Immigration (1909) 9,12,15

R. Daniels, The Politics of Prejudice (1962) 10

Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947) 13

Fogel, The Effect of Low Educational Attainment on Income: A Comparative Study of Selected Ethnic Groups, 1 J. of Human Resources (1966) 38

J. Hendrick, The Education of Non-Whites in California, 1849-1970 (1970) 17

Y. Ichihashi, Japanese In the United States (1932) 10

Page

Katzman, Opportunity, Subculture and the Economic Performance of Urban Ethnic Groups, 28 Amer. J. of Econ. & Sociology (1969) 38

Katzman, Urban Racial Minorities and Immigrant Groups: Some Economic Comparisons, 30 Amer. J. of Econ. & Sociology (1971) . 38

H. Kitano, Japanese Americans: The Evolution of a Subculture (1969) 10

M. Konvitz, The Alien and the Asiatic in American Law (1946) . 13

B. Lasker, Filipino Immigration (1931) 11

I. Light, Ethnic Enterprise in America: Business and Welfare Among Chinese, Japanese, and Blacks (1972)..... 9

J. Loewen, The Chinese in the Mississippi Delta (1973) 19

S. Lyman, The Asian in the West 9-26 (1970) 9

S. Lyman, Chinese Americans (1974) 9

McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947) 13

Page

R. McKenzie, Oriental Exclusion (1971) 15

H. Melendy, Asians in America: Filipinos, Koreans, and East Indians (1977) 11

P. Murray, States' Laws on Race and Color (1951) 12

New York State Advisory Comm., U. S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City (1977) 25,30,31,37,42

E. Sandmeyer, The Anti-Chinese Movement in California (1939) 9,12,15

U. S. Comm'n on Civil Rights, The Challenge Ahead, Equal Opportunity in Referral Unions (1976) 41

U. S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women (Aug. 1978) 32,33,34,35

U. S. Dept. of Commerce, Bureau of the Census, Census of the United States: 1970, Subject Reports, Final Report PC(2)-1G-Japanese, Chinese, and Filipinos in the United States (1973) 29

Page

U. S. Dept. of Commerce, Manpower Admin., H. Wong., The Relative Economic Status of Chinese, Japanese, Blacks and White Men In California (1974) 38

U. S. Dept. of Health, Education, & Welfare, Urban Associates, Inc., A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, Vol. II: Asian Americans (1974) 29,30,32,36

U. S. Dept. of Labor Manpower Admin., B. Sung, Chinese American Manpower and Employment (1975) 41

U. S. Dept. of Transp., Federal Highway Admin., F. Wu, P. Chen, Y. Okano, P. Woo, Involvement of Asian Americans in Federal-Aid Highway Construction Work in California (1978) 30,42

M. Weinberg, A Chance to Learn (1977) 17,20

G. Wollenberg, All Deliberate Speed, Segregation and Exclusion in California Schools, 1885-1975 (1976) 17

Page

J. Young, Discrimination, Income, Human Capital Investment, and Asian-Americans (1977) 36,37,38

Executive Order 9066 (1942), rescinded on Feb. 19, 1976 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Nos. 78-432, 435 and 436

KAISER ALUMINUM AND CHEMICAL CORP., et al.,

Petitioners,

-against-

BRIAN F. WEBER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, INC., AND ASIAN AMERICANS FOR EQUALITY AS AMICI CURIAE

Interest of Amici

The Asian American Legal Defense and Education Fund is a non-profit corporation established under the laws of the State of California and New York in 1974. It was formed to assist Asian Americans throughout the nation in the protection of their civil rights, including the right to equal employment opportunity, through the prosecution of lawsuits and the dissemination of public information.

The Asian Law Caucus, Inc., is a non-profit corporation established under the laws of the State of California in 1972. It was formed to assist Asian Americans in the greater San Francisco Bay Area in the protection of their rights in employment, housing, immigration, governmental benefits

and criminal justice by providing legal and educational services.

Asian Americans For Equality is a non-profit corporation established under the laws of the State of New York and originally founded in 1974. It was formed to promote equal employment opportunity for Asian working people through educational and social action programs.

Amici have found that much of their work concerns discrimination on the basis of race and color and national origin in the field of employment suffered by Asians as a result of their historic exclusion from the mainstream of American life and the legacy of overt racial discrimination sanctioned by law. It is amici's experience that racial discrimination in the job market

and working place remains a persistent barrier for Asian Americans, and that voluntary affirmative action programs are necessary to overcome burdens on equal employment opportunity. Such programs, including programs in which Asians now participate, are clearly imperiled if the decision of the court below becomes the law of the land.

The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Historic legally-imposed exclusion from equal participation in the economic life of the nation remains substantially unremedied for Asians as well as members of other racial minorities. When each of the

principal Asian American groups--Chinese, Japanese and Pilipinos--in turn came into competition for employment with white labor, each was subject to imposition of invidious racial legislation, much like the Black Codes, in the western states, and national prohibition of naturalization and further immigration. These legal restraints have now lapsed, but their vestiges and inequality remain. The present status of the Asian minority illustrates the practical necessity for affirmative action programs in employment: Asian Americans earn less than white Americans even when their education and occupational attainments are greater. Governmental and private efforts to overcome the impact of legally compelled unequal employment

opportunity through affirmative action programs are therefore proper and necessary.

ARGUMENT

I. ASIAN AMERICANS ARE A RACIAL MINORITY HISTORICALLY SUBJECT TO INVIDIOUS RACIAL DISCRIMINATION AND EXCLUSION SANCTIONED BY LAW.

The circumstances giving rise to this Court's decision in Yick Wo v. Hopkins, 118 U.S. 356 (1886)--discriminatory exclusion of Asians from business enterprise and employment in the western states--were neither anomalous nor unusual. Instead, the ordinance regulating laundry buildings which San Francisco authorities administered "with an evil eye and an unequal hand" to exclude Chinese from an entire occupation, and for which "no reason for it exists except hostility to the race and national-

ity to which petitioners belong," 118 U.S. at 374, was but one, and by no means the most invidious, part of the structure of racial discrimination and exclusion sanctioned by law. The breadth and scope of the resulting legally-enforced badge of race and color has no parallel in our nation's history, except the Black Codes of the southern states which gave rise to the Fourteenth Amendment. Like the Black Codes, the primary objective of the laws to which Chinese, Japanese and other Asians were subjected was discrimination and exclusion in the area of livelihood. Indeed, the history of Chinese, Japanese and Pilipinos in the western states, to which they first came, is largely the history of legally-imposed exclusion from the mainstream of

economic life and restriction to separate and lesser employment opportunity. These laws included state and local prohibitions on business enterprise and employment, national prohibition of naturalization and further increase in their numbers, and segregation in public education, which is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment," Brown v. Board of Education, 347 U.S. 483, 493 (1954). This condition is not remote in time: legally-imposed discrimination and exclusion has faded in recent years, but the badge of race and color persists.

Substantial Chinese immigration began

in 1847, with most immigrants arriving as contract labor in mining, railroad, agriculture and other menial labor.[1] Chinese laborers were a significant and the largest racial minority throughout the western states. As the Chinese came into competition with whites for employment after 1860, they were excluded from most labor and forced by legal and extralegal means into ghettos in a few cities, notably San Francisco. By 1900, Chinese were either self-

1. The history of the Chinese in the West is set forth in M. Coolidge, Chinese Immigration (1909); E. Sandmeyer, The Anti-Chinese Movement in California (1939); S. Lyman, The Asian in the West 9-26 (1970); S. Lyman, Chinese Americans (1974); see also P. Chiu, Chinese Labor in California, 1850-1880 (1967); I. Light, Ethnic Enterprise in America: Business and Welfare Among Chinese, Japanese and Blacks (1972).

employed in laundries, restaurants, and stores serving the Chinese community or employed in the general labor market as domestic servants, cooks and gardeners. Chinese, like black persons, were prevented by racial discrimination from any entry into other kinds of employment until after the Second World War.

Japanese immigration began in the 1860's, and, as did the Chinese before them, Japanese worked in agriculture, railroad, mining and other menial work.[2/] Japanese were effectively restrained by legally-imposed discrimination to work in truck farming,

2. The history of the Japanese in California is set forth in Y. Ichihashi, Japanese in the United States (1932); R. Daniels, The Politics of Prejudice (1962); H. Kitano, Japanese Americans: The Evolution of a Subculture (1969).

gardening and self-employment serving the Japanese community in California. Pilipino immigration followed the Spanish-American War with their recruitment as farm laborers.[3/] Pilipinos, somewhat like the Japanese, were restricted largely to migratory farm labor in the large west coast farming areas until the postwar era.

At every step in the process of restriction of Asian Americans to a separate and unequal sphere of economic endeavor and employment, the force of law was resorted to.[4/] Thus, Chinese miners were forced

3. The history of the Pilipino in the continental United States is set forth in B. Laster, Filipino Immigration (1931); H. Melendy, Asians in America: Filipinos, Koreans and East Indians 17-110 (1977).

4. The history of legally-enforced discrimination and exclusion of Asians is set forth in F. Chuman, The Bamboo People:

(footnote continued on next page)

out of mining through imposition of a miner's tax enforced only upon them.[5] The California State Constitution of 1879 expressly forbade the employment of any Chinese, directly or indirectly, by any California corporation or governmental entity.[6] While that provision did not survive constitutional challenge, other prohibitive statutes and ordinances were widely enacted throughout the western

(footnote continued from previous page) The Law and Japanese Americans (1976); E. Sandmeyer, The Anti-Chinese Movement In California (1939); M. Coolidge, Chinese Immigration (1909). See generally, P. Murray, States' Laws on Race and Color (1951).

5. Foreign Miners' License Tax, Act of Apr. 13, 1850, ch. 97, § 1 et seq., 1850 Cal. Stat. 221. See M. Coolidge, Chinese Immigration 36 (1906).

6. California State Constitution of 1879, Art. XIX, §§ 2-3. See E. Sandmeyer, The Anti-Chinese Movement In California 71-74 (1939).

states.[7] Other statutes, particularly aimed at Japanese, restricted the ownership of land.[8] Moreover, these prohibitions were part of a system of laws that restrained Asians in the enjoyment of virtually every civil right, most notably

7. See, e.g., Idaho Constitution of 1890, art. 13, § 5 (public works); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco laundry building ordinance); In re Hong Yen Chang, 84 Cal. 163 (1890) (attorneys); In re Yamashita, 30 Wash. 234, 70 P. 482 (1902); Asakura v. City of Seattle, 265 U.S. 332 (1924) (pawnbrokers); Yamashita v. Hinkle, 260 U.S. 199 (1922) (incorporation of businesses).

8. See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1924) (California statutes). See generally M. Konvitz, The Alien and the Asiatic in American Law 157-70 (1946); McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947).

public education, infra.[9] As with other official racial segregation and discrimination, equally debilitating and pervasive private discrimination was fostered. Legally-imposed restrictions on livelihood did not end in the western states until

9. See, e.g., California Constitution of 1879, art. II (Chinese denied right to vote); Idaho Constitution of 1890 (persons of Mongolian descent prohibited from voting and serving as jurors); People v. Hall, 4 Cal. 399 (1854) and Speer v. See Yup, 13 Cal. 73 (1855) (Chinese prevented from testifying in courts); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Executive Order 9066, rescinded by Presidential Proclamation No. 2714 of Feb. 19, 1976 (Japanese placed in internment camps during World War II); Mississippi Constitution, art. 14, § 263 (1942); Miss. Code Ann. § 459 (1942) (marriages between white persons and Mongolians prohibited); Mont. Rev. Codes Ann. §§ 5701, 5702 (1935) (marriages between white persons and Chinese or Japanese void); S.D. Code § 14.0106 (1939) (marriages between white persons and Koreans, Malayans and Mongolians void); Utah Code Ann. § 40-1-2 (1943)(marriages between white persons and Mongolians prohibited).

the postwar era.[10]

The legal structure of discrimination and exclusion extended to prohibitions on naturalization and immigration.[11] Such laws and statutes were expressly intended to extinguish or limit Asian competition to white business enterprise and employment. They applied to each of the major Asian groups in turn, first the Chinese,[12]

10. See, e.g., Oyama v. State of California, 332 U.S. 633 (1948) (California Alien Land Law of 1920); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (commercial fishing license).

11. The history of the exclusionary laws is set forth in M. Coolidge, Chinese Immigration (1909); E. Sandmeyer, The Anti-Chinese Movement in California (1939); F. Chuman, The Bamboo People: The Law and Japanese Americans (1976); see generally F. Auerbach, Immigration Laws of the United States (1955); R. McKenzie, Oriental Exclusion (1971).

12. See The Chinese Exclusion Case, 130 U.S. 581 (1889); In re Ah Yup, 1 F. Cas. 223 (C.C. Cal. 1878); see also United States v. Wong Kim Ark, 169 U.S. 649 (1898) and cases cited therein.

the Japanese[13] and then Pilipinos.[14] The effect of this discrimination was national in scope: effectively branding every Asian on the basis of race and color and nationality an alien unfit for citizenship and further immigration. This historically unique restriction did not finally end until 1965.[15]

The history of public education for Asians in California is a "classic case of [the] de jure segregation involved in

13. See Ozawa v. United States, 260 U.S. 178 (1922); see also, Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq.

14. Philippine Independence Act, 48 Stat. 456 (1934).

15. Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1151-1156.

Brown v. Board of Education," Guey Heung Lee v. Johnson, 404 U.S. 1215, 1215-16 (1971) (Douglas, J., as Circuit Justice).[16] California's education law was formally amended in 1860[17] to permit separate schools for the education of "Negroes, Mongolians and Indians."[18] The consti-

16. The history of school segregation in California is reviewed in C. Wollenberg, All Deliberate Speed, Segregation and Exclusion in California Schools, 1855-1975 (1976) [hereinafter "Wollenberg"] and J. Hendrick, The Education of Non-Whites in California, 1849-1970 (1977) [hereinafter "Hendrick"]. Pertinent sources and studies are cited. See also M. Weinberg, A Chance to Learn (1977).

17. 1860 Cal. Stats., ch.329, § 8; see also 1863 Cal. Stats., ch.159.

18. See Wollenberg at 10-14.

tutionality of the separate school law was upheld in Ward v. Flood, 48 Cal. 36 (1874), but the statute was repealed for economic reasons.[19] Following unsuccessful efforts to exclude Chinese and Japanese children from public education altogether,[20] specific statutory authority was created for the establishment of separate schools for Chinese, Japanese and Indian children.[21] The constitu-

19. General School Law of California, § 1662 at 14 (1880); see Wollenberg at 24-26.

20. See, e.g., Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885) (Chinese); Aoki v. Deane (Japanese), discussed in Wollenberg at 48-68.

21. 1885 Cal. Stats., ch.117, § 1662 (Chinese); 1893 Cal. Stats., ch.193, § 1662 (Indians); 1921 Cal. Stats., ch.685, § 1 (Japanese). See generally Wollenberg at 28-107; Hendrick at 11-59.

tionality of the California Education Code was upheld in Wong Him v. Callahan, 119 F. 381 (C.C. Cal. 1902). These provisions were not repealed until 1947,[22] see Guey Heung Lee v. Johnson, supra, 404 U.S. at 1215.

Elsewhere, Asians were treated as "colored persons" subject to the same racial segregation imposed upon black school children, see, e.g., Gong Lum v. Rice,[23] 275 U.S. 78 (1927).

22. 1947 Cal. Stats., c. 737, § 1. The repeal was precipitated by Mendez v. Westminster School District, 64 F. Supp. 544 (C.D. Cal. 1946), aff'd, 161 F.2d 744 (9th Cir. 1947) (Mexican-Americans).

23. See generally J. Loewen, The Chinese in the Mississippi Delta (1973).

Notwithstanding the repeal of the California separate school law, "[j]udicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minorit[ies]," University of California Regents v. Bakke, __U.S.__, 57 L.Ed.2d 750, 822 (Brennan, J.).[23] In particular, there have been recent school desegregation decisions in areas of significant Asian school population, such as San Francisco, Los Angeles, Pasadena, San Diego, Oxnard and Stockton,[24] which include a substantial

23. See also Hendrick at 104-06; California State Dept. of Education, Racial & Ethnic Survey of California's Public Schools, Fall 1966, iii (1967).

24. San Francisco: Johnson v. San Francisco Unified School District, 339 F.
(footnote continued on next page)

majority of the entire Asian American

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Supp. 1315 (N.D. Cal. 1971), app. for stay denied, Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971), vacated & remanded, 500 F.2d 349 (9th Cir. 1974); San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 943, 92 Cal. Rptr. 309, 311, 479 P.2d 669, 671 (1971) (en banc), cert. denied, 401 U.S. 1012 (1971); Lau v. Nichols, 414 U.S. 563 (1974) (Title VI violation found).

Los Angeles: Crawford v. Board of Education, 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976); see Kelsey v. Weinberger, 498 F.2d 701, 704 n.19 (D.D.C. 1974) (HEW determination of violation of Emergency School Aid Act of 1972, 20 U.S.C. § 1600 et seq., noted).

Pasadena: Spangler v. Pasadena City Bd. of Education, 311 F. Supp. 501 (C.D. Cal. 1970); Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963).

San Diego: People v. San Diego Unified School District, 19 Cal. App.3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971) (14th Amendment violation), cert. denied, 405 U.S. 1016 (1972).

Oxnard: Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974), on remand from 488 F.2d 577 (9th Cir. 1973).
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population of the State.[25] Moreover, in 1972, Congress determined that Asians remain a group "who, as a result of language barriers and cultural differences, do not have equal education opportunity." Emergency School Aid Act of 1972, 20 U.SC. § 1619(9)(A).

(footnote continued from previous page) Stockton: Hernandez v. Board of Education of Stockton Unified School Dist., Civ. Action No. 101016, San Joaquin Super. Ct. (Oct. 9, 1974).

25. See California State Advisory Comm., U.S. Comm'n on Civil Rights, Asian-Americans and Pacific Peoples: A Case of Mistaken Identity 14-16 (1975).

II. ASIAN AMERICANS ARE STILL SUBJECT TO THE VESTIGES OF PRIOR RACIAL DISCRIMINATION AND EXCLUSION COMPELLED BY LAW.

While the express legal structure and sanction that "put the weight of government behind racial hatred and separatism"[26] has faded, its effects have not been eliminated root and branch. The legislative history of Title VII of the Civil Rights Act of 1964 clearly indicates that Congress recognized the need to protect Asian Americans against continuing employment discrimination. In the debates on the 1972 amendments to Title VII, Senator Williams noted that Asians and other minority workers had been "relegated to

26. University of California Regents v. Bakke, __U.S.__, 57 L.Ed.2d 750, 813 (1978) (Brennan, J.).

the lowest paying, least desirable jobs--if indeed, they get hired at all." 118 Cong. Rec. 294 (1972). Congress observed that such discrimination against Asians was based in part on their national origin, see, e.g., 117 Cong. Rec. 32094 (1971) (comments of Reps. Pucinski and Dent), and that, in addition, Asian women were likely to be "victims of double discrimination." 117 Cong. Rec. 32096 (1971) (comments of Rep. Abzug). Senator Cranston also remarked in a letter to the Civil Service Commission chairperson that the 1972 amendments to Title VII were designed to "deal with discrimination in Federal Government employment and to open up more high level positions for minorities, particularly Mexican-Americans, blacks,

Indians, Orientals and women." 118 Cong. Rec. 4933 (1972). Federal agencies charged with enforcement of Title VII, Executive Order 11246 and other civil rights guarantees have similarly included Asians as a group protected by anti-discrimination guarantees.[27]

27. See, e.g., 29 C.F.R. Part 1602 (Title VII employer reporting and record keeping requirements); 41 C.F.R. Parts 60-2 and 60-4 (Executive Order 11246 regulations for affirmative action programs); 28 C.F.R. Part 42 (LEAA regulations, see §§ 42.203(d) and 42.302(e)); 28 C.F.R. Part 42, subpart F (Justice Dept. Title VI guidelines for federal agencies, see §§ 42.402(e)(3)); 28 C.F.R. Chapter I, Part 50, § 50.14 (Justice Dept. federal executive agency guidelines on employee selection procedures, see § 50.14(4)); but see New York State Advisory Committee, U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 28, 45 (1977) (federal and local officials criticized for failure to recognize Asians as minority and to enforce civil rights statutes and laws).

It is the experience of amici that Asian Americans have been reluctant to assert their legal rights in court because they have historically been subjected to a wide range of legally-imposed discrimination.[28] However, an increasing number of employment discrimination cases have been brought in recent years by Asian Americans or in their behalf alleging discrimination in training,[29] hiring,[30]

28. Congress perceived the subtle nature of discrimination against Asian Americans today and their reluctance to seek legal redress, noting that "cases involving discrimination against Orientals have been practically invisible under Title VII." 117 Cong. Rec. 32096 (1971) (comments of Rep. Abzug).

29. E.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972) (union apprenticeship and training programs discriminate against black, Mexican, Oriental and other minority applicants).

30. E.g., Chinese for Affirmative Action
(footnote continued on next page)

promotions[31] working conditions[32] and terminations.[33]

(footnote continued from previous page)
v. Federal Communications Comm'n, 16 E.P.D. ¶ 8290, at 5485 (D.C. Cir. 1978) (en banc) (Robinson, J., dissenting) (statistics established prima facie case of discrimination against Asian Americans by San Francisco television station); United Pilipinos for Equal Employment v. California Blue Shield, N.D. Cal. Civ. Action No. C 73-1085-CBR, consent decree approved Nov. 4, 1974 (Class of Asian Americans denied hiring and managerial and supervisory promotions); United States v. City of San Diego, S.D. Cal. 76-1093, consent decree approved Dec. 20, 1977 ; United States v. County of San Diego, S.D. Cal. 76-1094, consent decree approved May 6, 1977 (women, blacks, Hispanics and Asians claim discrimination in hiring for all county and all city positions except police); Officers for Justice and United States v. City and County of San Francisco, N.D. Cal. C-73-0657-RFP, C-77-2884-RFP (challenge to entry level and sergeants civil service examinations, and to failure to hire bilingual officers, includes Asians).

31. E.g., Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, __F.2d__, 17 E.P.D. ¶ 8518
(footnote continued on next page)

(footnote continued from previous page) (9th Cir. 1978) (Pilipino denied promotion to account executive); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) (Chinese political science professor denied tenure); Martinez v. Bechtel Corp., 10 E.P.D. ¶ 10,570 (N.D. Cal. 1975) (Class of Pilipino women denied promotion to higher-level management positions); National Organization for Women v. Bank of California, 5 E.P.D. ¶ 8617 (N.D. Cal. 1973) (Pilipinos included in consent decree requiring bank to establish affirmative action plan); Saunders v. Naval Air Rework Facility, N.D. Cal. Civ. Action No. C-74-0520, consent decree approved Sept. 28, 1978 (class of employees claiming denial of supervisory positions includes blacks, Mexican-Americans and Pilipinos).

32. E.g., Domingo v. New England Fish Co., 445 F. Supp. 421 (W.D. Wash. 1977) (finding of discrimination against Pilipino cannery workers in job placements and housing conditions).

33. E.g., Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975) (Chinese pharmacist allegedly terminated because of race).

Furthermore, demographic information establishes that while Asians are the racial minority which has made the greatest progress in the post-war era, discrimination still operates to significantly disadvantage Asian American employment opportunities.

In 1970, well over a third lived in California and well over a majority in the western states,[34] and estimates of all Asian groups in 1970 range up to

34. See U.S. Dept. of Health, Education & Welfare, Urban Associates, Inc., A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, Vol. II: Asian Americans 16-17 (1974) (HEW Publ. No. (OS) 75-121 (hereinafter "HEW Study")); see generally, U.S. Dept. of Commerce, Bureau of the Census, Census of the United States: 1970, Subject Reports, Final Report PC(2)-1G-Japanese, Chinese, and Filipinos in the United States (1973).

2,089,932.[35] The state of California estimates that between 1970 and 1977, the Asian American population doubled from 549,248 to 1,290,000 or 5.4% of the state's population, almost all in the San Francisco and Sacramento areas and Los Angeles and San Diego Counties where they form substantial minority populations.[36]

35. New York State Advisory Comm. to the U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 4 (Nov. 1977) (estimate including Chinese, Pilipino, Hawaiian, Korean, Japanese, Guamanian, Samoan, Malayn, Polynesian and Thai groups). It should be noted that the Asian population is undercounted by the Bureau of the Census, HEW Study at 4.

36. See U.S. Dept. of Transportation, Federal Highway Admin., F. Wu, P. Chen, Y. Okano, P. Woo, Involvement of Asian Americans in Federal-Aid Highway Construction 15-17 (March 1978) (hereinafter "DOT Study") (California's population in 1977 estimated to be 63.3% white, 17.6% Mexican American, 6.9% black, 5.4% Asian American, and 4.8% others).

In 1970, Asians were already 15.2% of the San Francisco County population and 3.5% of the Los Angeles population. New York City, the other area of Asian concentration, estimated that by 1975 the Asian American population had doubled since 1970 and that the Asian population was 2.9% of the total.[37]

The postwar era has seen Chinese, Japanese and Pilipinos entering the economic mainstream in greater numbers, but many Asians continue in traditional jobs to which they were once largely restricted by law. A quarter of Chinese men are employed as service workers in restaurants and laundries, and most Chinese in "mana-

37. See New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority, supra at 5.

gerial" positions are actually owners and proprietors of small retail and food stores or restaurants in Chinatowns throughout the nation.[38] 40% of Pilipino men work in traditional low-skilled, low wage menial laborer and service occupations, many as farm workers.[39] After wartime internment, Japanese were legally deterred from and did not return to traditional rural employment and enterprises.

The educational attainment of Japanese and Chinese Americans exceeds that of the population as a whole, although there has been a recent decline.[40] The higher

38. HEW Study at 91-92.

39. HEW Study at 93-95.

40. U.S. Comm. on Civil Rights, Social Indicators of Equality for Minorities and Women 9-16 (Aug. 1978) [hereinafter "CCR Study"]; HEW Study at 70.

level of educational attainment of these Asian groups distinguish them from other racial minorities.[41] However, on the occupational overqualification index, Asian Americans (except for Chinese males at the high school level), like other racial minorities, are more overqualified for their occupations than white persons. This is true of high school graduates in occupations typically not requiring a high school diploma and college graduates in occupations typically not requiring a college degree.[42] In addition, earnings tend to be higher for people with higher educational attainment for all groups, but all racial minorities, including Asians,

41. CCR Study at 10-15.

42. CCR Study at 17-22.

earn less than whites with the same educational attainment.[43] "In 1976, Japanese, Chinese and Pilipino Americans were much more likely to have completed a college education than majority males but, as college graduates, they earned far less than majority males."[44] Consistent with their higher educational attainment, more Chinese and Japanese men have prestigious occupations than other minority and white persons,[45] although Asian Americans exhibit as much or more occupational segregation as other racial minority groups.[46]

43. CCR Study at 22-27, 89.

44. CCR Study at 27.

45. CCR Study at 34-38, 90. But see supra at 31-32.

46. CCR Study at 39-44, 90 ("Occupational segregation" defined as degree of dissimilarity of occupations between minority groups and white persons measured by the percentage of a group who would have to change occupations in order to have the same occupational distribution as white persons).

For all minority groups, occupational segregation is increasing.[47] The family income of Japanese Americans exceeds that of white, other Asian and other minority groups, but after statistically equalizing levels of educational attainment, occupational prestige, age, hours and weeks worked, and cost of living in different localities, all racial minorities consistently earn substantially less than white persons.[48]

Other studies have made similar findings. A U.S. Department of Health, Education and Welfare study confirms that "when educational attainments are taken into account in all three Asian subgroups,

47. CCR Study at 39-44, 90.

48. CCR Study at 47-56, 90.

the proportion of workers employed in higher status jobs is not equal to the proportion in the total population" and that "it is easier for persons in the majority population to obtain employment in higher level jobs without a college degree than it is for the Asian Americans."[49] The HEW study also found an income lag for Asians with comparable education and occupation to that of whites, higher household income due to greater likelihood of both husband and wife working, and substantial pockets of poverty, particularly in San Francisco and New York City.[50]

49. HEW Study at 103; see id. at 82-103.

50. HEW Study at 104-131. The study also found higher income levels largely attributable to a greater proportion of Asians in Hawaii, where income and standard of living are higher, compare J. Young, Dis-
(footnote continued on next page)

Economic studies using various statistical models demonstrate that Asians have lower earnings because they receive lower returns from education than whites, are excluded from high earning occupations, do not advance at the same rate as whites in particular occupations, and experience greater unemployment, and that such disparities are not statistically accountable but for

(footnote continued from previous page)
crimination, Income, Human Capital Investment And Asian-Americans 89-90 (1977). For statistics on urban Asian communities with indicia of economic and employment problems most similar to black and other racial minorities, e.g., San Francisco and New York City, see New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City (Nov. 1977); California State Advisory Committee, U.S. Comm'n on Civil Rights, Asian Americans and Pacific Peoples: A Case of Mistaken Identity (Feb. 1975).

racial discrimination.[51]

III. VOLUNTARY AFFIRMATIVE ACTION PROGRAMS ARE NECESSARY AND PROPER TO GUARANTEE EQUAL EMPLOYMENT OPPORTUNITY FOR ASIAN AMERICANS.

The American dream is not yet within reach of most Asian Americans. It is true that legally-imposed discrimination and exclusion has ended, that formal pro-

51. U.S. Dept. of Commerce, Manpower Admin., H. Wong, The Relative Economic Status of Chinese, Japanese, Black, and White Men in California (1974); J. Young, Discrimination, Income, Human Capital Investment, and Asian-Americans (1977); M. Katzman, "Opportunity, Subculture and the Economic Performance of Urban Ethnic Groups," 28 American J. of Economics & Sociology 351-366 (1969); M. Katzman, "Urban Racial Minorities and Immigrant Groups: Some Economic Comparisons," 30 American J. of Economics & Sociology 16-25 (1971); W. Fogel, "The Effect of Low Educational Attainment On Income: A Comparative Study of Selected Ethnic Groups," 1 J. of Human Resources 22-39 (1966).

hibition of discrimination on the basis of race and color is firmly established in American life, and that, compared to other racial minorities, Asian Americans have been better able to overcome obstacles to full participation in American life since the Second World War. However, although significant numbers of Asian Americans have overcome obstacles to achieve notable educational and occupational success, such success has not wholly extinguished the badge of inferiority of race and color. Indeed, there is no clearer demonstration of the intractability of state-imposed racial inferiority than the fact that the earnings and employment opportunity of Asian Americans remain less than that of white Americans despite

greater educational and occupational attainment. Therefore, affirmative action in employment is a necessary specific cure for remaining vestiges of legally-imposed exclusion of Asian Americans from full participation in the economic life of the nation.

For Asian Americans, affirmative action programs do no more than provide a specific remedy for the vestiges of the prior state-imposed discrimination and exclusion that effectively restricted Asians to restaurant, laundry, farm labor and other low-paying traditional occupations separate and apart from the dominant society, supra. Without such programs, Asian Americans, particularly blue collar workers, do not have access to many jobs,

especially skilled craft jobs such as the position in question in the instant case. For instance, Asians, like other minorities, have been unable to enter skilled trades in the construction industry in any appreciable numbers in areas of substantial Asian population because of racially exclusionary policies of construction unions; indeed, they are practically invisible, see, e.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972).[52] One study found that Asian participants in the Fed-

52. See also U.S. Dept. of Labor, Manpower Admin., B. Sung, Chinese American Manpower and Employment 184, 187-189 (1975) (San Francisco and New York City construction union statistics); see generally U.S. Comm'n on Civil Rights, The Challenge Ahead, Equal Opportunity in Referral Unions (1976).

eral Highway Administration highway construction-related trades and apprenticeship training, who successfully completed their training, nevertheless were unable to enter apprenticeship programs because of racial discrimination against Asians within the construction industry in California.[53] Another striking example is the recent protracted efforts of amicus Asian Americans for Equality, other groups and government agencies to convince builders and contractors to employ Asians in trainee construction jobs at Confucius Plaza, a federally-supported residential and commercial complex in the heart of New York City's Chinatown.[54]

53. DOT Study at 41-42.

54. See New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority, supra at 28-29.

For this reason, federal agencies charged with enforcement of civil rights statutes and executive orders have included Asian Americans among racial minorities for whom participation in voluntary affirmative action programs is deemed necessary. See, e.g., U.S. Department of Labor, Office of Contract Compliance, Affirmative Action Programs of Government Nonconstruction Contractors, 41 C.F.R. Part 60-2, effective July 1, 1968 (35 Fed. Reg. 2586), last amended October 20, 1978 (43 Fed. Reg. 49249 (§ 60-2.11(a)); Affirmative Action Programs of Government Construction Contractors, 41 C.F.R. Part 60-4, effective October 20, 1978 (43 Fed. Reg. 49254) (§ 60-4.3); see also 41 C.F.R. § 60.50.1(d); Law Enforcement Administration Agency,

Equal Employment Opportunity Program Guidelines, 28 C.F.R. Part 42, subpart E (43 Fed. Reg. 28802), effective June 30, 1978 (28 C.F.R. § 42.302(e)); Equal Employment Opportunity Commission Guidelines on Affirmative Action, adopted December 11, 1978, 29 C.F.R. Part 1608 effective January 11, 1979 (44 Fed. Reg. 4422) (see §§ 1608.4 and 1608.5 incorporating standards of the Department of Labor). State and local governmental entities have also included Asians in their affirmative action programs. See, e.g., Hiatt v. City of Berkeley, 149 Cal. Rptr. 155, 85 Cal. App.3d 29 (Cal. Ct. App. 1978); Hull v. Cason, 47 U.S.L.W. 2146 (Cal. Ct. App., Dec. 26, 1978) (fire department affirmative action programs in

Berkeley and Oakland, California, including Asians, held unconstitutional).

Without affirmative action, amici respectfully submit that the entrenched stigma of race and color once imposed by force of law will continue to handicap Asian Americans who seek to enjoy the guarantee of equal employment opportunity in the federal Constitution, statutes and executive orders. Absent such affirmative efforts by government and private employers, those guarantees will never be effectively and practically enforced. Government and private employers can and should examine whether their employment policies have the effect of denying equal employment opportunity because they have previously subjected a racial minority to

discrimination and exclusion from the economic life of the nation, cf. Gaston County v. United States, 395 U.S. 285, 293 (1969). Furthermore, government and private employers should initiate properly considered remedial measures to assure that their employment policies take account of artificial barriers which have their roots in prior discrimination and exclusion. It is clear that Asian Americans have been guaranteed equal opportunity for livelihood since 1886 when this Court declared that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unjust hand, so as practically to make unjust and illegal dis-

criminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution," Yick Wo v. Hopkins, 118 U.S. 356, 373-74. Permitting voluntary affirmative action programs, however, is necessary today to give life to that pledge.

Asian Americans as well as blacks were subjected to discriminatory legislation, notably in the field of employment, supra. Furthermore, this Court long ago recognized that the protections of the post-Civil War amendments and the civil rights acts were specifically intended to protect the rights of "Chinese coolie labor" as well as black freedmen, Slaughter House Cases, 83 U.S. 36 (1873), and that "the applica-

tion of the Amendment to the Chinese race was considered and not overlooked," United States v. Wong Kim Ark, 169 U.S. 649, 697-699 (1898) (citing legislative history of the civil rights acts and Fourteenth Amendment). The post-Civil War amendments were not intended to prohibit measures designed to remedy the effect of the nation's past treatment of racial minorities. The Congress that passed the Thirteenth and Fourteenth Amendments and early civil rights acts is the same Congress that passed the 1866 Freedmen's Bureau Act, which provided many of its benefits and protections only to black freedmen then subject to the Black Codes, University of California Regents v. Bakke, supra, 57 L.Ed.2d at 838-39

(1978) (Marshall, J.). "Such a result would pervert the intent of the framers by substituting abstract equality for the genuine equality the amendment was intended to achieve," id.

Title VII recognizes that Asians and other minority workers are still "relegated to the lowest paying, least desirable jobs--if indeed, they get hired at all," 118 Cong. Rec. 294 (1972). "Executive, judicial, and congressional actions subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race," University of California Regents v. Bakke, supra, 57 L.Ed.2d at 811 n.28. "Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and

rejected proposals to alter Executive Order 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action," id.

Last, the EEOC and other federal agencies, which recognize that Asians are a group entitled to the protections of executive orders and other civil rights guarantees, have also sanctioned affirmative action employment programs, supra. The new EEOC Guidelines on Affirmative Action, adopted for the express purpose of effectuating "the clear Congressional intent to encourage voluntary affirmative action," 29 C.F.R. § 1608.1(a), declare "the principle that each person subject to Title VII should take voluntary

action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation," 29 C.F.R. § 1608.1(c).

To use the Constitution and civil rights statutes and laws as a sword against such efforts would be to stultify the purpose of those guarantees, cf. Railway Mail Association v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

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Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, ET AL.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, ET AL.

No. 78-436

UNITED STATES OF AMERICA

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE AND HOWARD UNIVERSITY AS *AMICI CURIAE*

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Swift & Co. v. Hocking Valley R.R. Co., 243 U.S. 281 (1917)	46
United Jewish Organizations v. Carey, 430 U.S. 144 (1977)	105
United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir.1975), cert. denied, 425 U.S 944 (1976)	116
United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1973)	117
United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971)	100
United States v. Carolene Products Co., 304 U.S. 144 (1938)	62

Cases:

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United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978)	115
United States v. Ironworkers Local 86, 315 F.Supp. 1202 (W.D. Wash. 1970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S 984 (1971)..	19
United States v. Johnson, 319 U.S. 302 (1943)	47,48
United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), cert. denied 400 U.S. 943 (1970)	18
United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973)	23,115
United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974)	115
United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973)	12,115
United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969)	19
United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973)	19,115
United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960)	119

Cases:

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Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1972)	88
Warth v. Seldin, 422 U.S. 490 (1975)	45
Washington v. Davis, 426 U.S. 229 (1976)	88
Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), cert. denied, 429 U.S. 861 (1976)	72

Constitutional Provisions, Statutes, Executive Orders and Regulations:

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United States Constitution, Fifth Amendment	50
United States Constitution, Fourteenth Amendment	51,52,5
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261	21
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42 U.S.C. §2000e, et seq., Title VII of the Civil Rights Act of 1964	passim
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Executive Order No. 10,925, 3 C.F.R. 443 (1959-63 Comp.) 106

Executive Order No. 11,246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303..... passim

41 C.F.R. §60-2 (Revised Order No. 4) 104-06

Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290, 29 C.F.R. Part 1607 (1978) 28,85-86

Equal Employment Opportunity Commission, Guidelines on Affirmative Action, 44 Fed. Reg. 4422, 29 C.F.R. Part 1608 (1979) ..... passim

Equal Employment Opportunity Coordinating Council, Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38814 (1976) 28

Executive Decisions and Opinions:

EEOC Decision 74-106, 10 FEP Cases 269 (April 2, 1974) 27

EEOC Decision 75-268, 10 FEP Cases 1502 (May 30, 1975) 28

PAGE

Office of the Solicitor, U.S. Department of Labor, Legal Memorandum, in Hearings on The Philadelphia Plan and S.931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255 (1969) 20

42 Opinion of Attorney General No. 37 (Sept. 22, 1969) 20

Legislative History:

110 Cong. Rec. 6549 (1964) 16

110 Cong. Rec. 7213 (1964) 14,16

110 Cong. Rec. 9881-82 (1964) 14-16

110 Cong. Rec. 12723 (1964) 15

118 Cong. Rec. 3460-63 (1972) 22

Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 10

Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong. 1st Sess. (1963) 9

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Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963) 10

H.R. Rep. No 914, 88th Cong., 1st Sess. (1963)..... 11,12

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) 22

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 22

Other Authorities:

Adminstrative Office of the United States Courts, 1976 Annual Report of the Director 34

Administrative Office of the United States Courts, 1977 Annual Report of the Director 35

Administrative Office of the United States Courts, 1978 Annual Report of the Director 35

Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) 61

Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723 (1972) 20,23,41

PAGE

Committee on Government Contracts, Pattern for Progress: Final Report to President Eisenhower (1960) 106

Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 11,17

Equal Employment Opportunity Commission, Legislative History of the Equal Employment Opportunity Act of 1972 22

Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966) 76

Gould, Black Workers in White Unions, (1977) 91

Hall, Black Vocational, Technical and Industrial Arts Education (American Technical Society 1973) 93

Hill, Black Labor and the American Legal System: Race, Work and the Law (1977) 91

Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341 107

PAGE

Karson and Radosh, "The American Federation of Labor and the Negro Worker, 1894-1949," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968) 96

Marshall, The Negro and Organized Labor (1965) 91,94

Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968) 96,99

Marshall and Briggs, The Negro and Apprenticeship (1967) 91,98,102-103

McPherson, The Political History of the United States of America During the Period of Reconstruction (reprinted 1969) 93

Mosteller, Rourke and Thomas, Probability With Statistical Applications (1970) 76

Myrdal, An American Dilemma (Harper & Row ed., 1962) 91-93,96-98,100

N.A.A.C.P. Legal Defense And Educational Fund, Inc., Brief as Amicus Curiae, No. 76-811 52

Northrup, Organized Labor and the Negro (1944) 91,96-97,100

PAGE

Sovern, Legal Restraints on Racial Discrimination in Employment (1966) 9,106

Spero and Harris, The Black Worker (Atheneum ed., 1968) 91-92

State Advisory Committee, United States Commission on Civil Rights, 50 States Report (1961) 95

tenBroek, Equal Under Law (1951) 52

United States Commission on Civil Rights, Employment (1961) 94

United States Commission on Civil Rights, The Challenge Ahead (1976) 98,103

United States Bureau of the Census, Census of Population: 1970 Vol. I, Characteristics of the Population, Part 20, Louisiana (1973).. 67-68,73-74

Weaver, Negro Labor, A National Problem (1946) 91,93-94,99,101

Weinstein, 1 Evidence 62

Wright and Graham, Federal Practice and Procedure (1977) 62

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-432
UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Petitioner,
v.
BRIAN F. WEBER, et al.

No. 78-435
KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER, et al.

No. 78-436
UNITED STATES OF AMERICA
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
BRIAN F. WEBER, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE AND HOWARD UNIVERSITY AS AMICI CURIAE

Interest of Amici

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation

established under the laws of the State of New York. It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

The National Urban League, Incorporated, is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 69 years,

the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

Howard University was established as a private nonsectarian institution by Act of Congress on March 2, 1867. Since its inception, the University has grown from six departments in 1867 to its present composition of seventeen schools and colleges. Nearly 40,000 students have received diplomas, degrees or certificates from Howard; of that total, well over 14,000 have received graduate and professional degrees. Throughout this century of growth, the unique mission of the University has been supported in the main by congressional appropriations. Since 1928 Howard University, while remaining a private institution, has received continuous annual financial support from the federal government.[1/] Today, the Uni-

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1/ The Committee on Education commenting on the bill to amend section 8 of an act entitled "An Act to incorporate the Howard University..." stressed:

versity's land, buildings and equipment are valued at more than 150 million dollars. Thus, both the executive and legislative branches are sensitive to the need to maintain Howard as an institution in service to blacks.

1/ Cont'd

> Apart from the precedent established by 45 years of congressional action, the committee feels that Federal aid to Howard University is fully justified by the national importance of the Negro problem. For many years it has been felt that the American people owed an obligation to the Indian, whom they dispossessed of his land, and annual appropriations of sizable amounts have been passed by Congress in fulfillment of this obligation....
>
> Moreover, financial aid has been and still is extended by the Federal Government to the so-called land-grant colleges of the various States. While it is true that Negroes may be admitted to these colleges, the conditions of admission are very much restricted, and generally it may be said that these colleges are not at all available to the Negro, except for agricultural and industrial education. This is particularly so in the professional medical schools, so that the only class A school in America for training colored doctors, dentists, and

Howard University has a unique interest in the resolution of this case by the Supreme Court. This case raises questions of great importance about the permissible scope of voluntary affirmative action under Title VII. Affirmance of the lower court's proscription against voluntary intitatives will chill voluntary programs in particular and affirmative action generally.

1/ Cont'd

> pharmacists is Howard University, it being the only place where complete clinical work can be secured by the colored student. Committee on Education Report Accompanying H.R. 8466 (1926). See also, 14 Stat. 1021 (1926).

SUMMARY OF ARGUMENT

I. In enacting Title VII in 1964 Congress neither expressly approved nor expressly disapproved race-conscious efforts to correct the effects of discriminatory practices. However, subsequent judicial decisions and executive actions established that Title VII permitted, and in some circumstances required, the remedial use of race. In amending Title VII in 1972 Congress approved this interpretation of the statute. The Equal Employment Opportunity Commission's Guidelines on Affirmative Action correctly codified this interpretation authorizing employers and unions to adopt racial preferences as remedial measures where they have a reasonable basis for that action.

II. Race-conscious affirmative action is justifiable where an employer or union has a reasonable basis for believing that it might otherwise be held in violation of the law. The employer or union need not admit nor prove

prior discrimination, and it may take race-conscious action to remedy the disadvantages affecting minorities as a result of discrimination by others. A more rigid standard -- like that adopted by the majority of the Fifth Circuit requiring proof or admission of discriminatory practices -- would largely eliminate voluntary affirmative action. Moreover, a lawsuit challenging race-conscious action under that standard does not present a case or controversy because it is not in the interest of either litigant to prove the central factual issue, prior discrimination. Finally, the Fifth Circuit's standard, if accepted by this Court, would raise serious questions as to the constitutionality of Title VII.

III. Kaiser and the Steelworkers properly instituted a race-conscious plan because they had a reasonable basis to believe that their craft selection practices had violated, and without affirmative action would continue to violate, both Title VII and Executive Order 11,246. Moreover, it was appropriate and socially responsible for the Company and the Union to design a program which would remedy some of the

effects of decades of discriminatory practices by employers, unions, and governmental bodies which had denied training opportunities to blacks in the skilled crafts.

The affirmative action plan was proper since it expanded the employment opportunities of all workers, black and white. The race-conscious component of the plan conformed to provisions which had been approved by courts and by administrative agencies and was designed as an interim measure which would terminate after remedying the discriminatory practices. Finally, it resulted from collective bargaining in which the interests of all the workers were represented and it thus furthered the policies favoring the voluntary resolution of both labor and discrimination disputes.

ARGUMENT

I. TITLE VII PERMITS EMPLOYERS AND UNIONS TO TAKE VOLUNTARY RACE-CONSCIOUS AFFIRMATIVE ACTION

A. Legislative History: 1964

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Employment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[2/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to encourage voluntary action to eliminate the effects of discrimination against black citizens:

2/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
>
> * * *
>
> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

2/ Cont'd

Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.... H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 2018.

This Court has repeatedly recognized the purpose of the Act: "The objective of Congress in the enactment of Title VII ... was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). This Court also has recognized that Congress selected "[c]oopera-

tion and voluntary compliance ... as the preferred means for achieving this goal." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). The Court, in keeping with the intent of Congress (see H.R. Rep. No. 914, pp. 10-11, supra), has endorsed the imposition of judicial remedies under Title VII as "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-18, quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

The record in this case shows that what Congress intended and what the Court has endorsed is precisely what happened: Kaiser and the Steelworkers examined their practices and concluded that there was a reasonable basis to believe that they would be found liable for discrimination against blacks; they had "looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to

speak of," A. 83 (English); and they voluntarily adopted a plan to bring blacks into craft jobs. See Section IIIA and n. 26, infra. In the absence of compelling legislative history to the contrary, Title VII cannot be read to foreclose the use of such race-conscious numerical plans to accomplish the primary purpose of the Act.

The legislative history of the original enactment of Title VII in 1964 conclusively demonstrates neither approval nor disapproval by Congress of race-conscious efforts to correct the effects of the past discriminatory exclusion of blacks from training and job opportunities. The major argument against congressional approval of such efforts is premised upon the addition to the bill on the Senate floor of §703(j), which states that nothing in Title VII shall "require" preferential treatment because of race "on account of an imbalance...."[3/]

3/ "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with

Prior to the adoption of this amendment, the Senate floor managers of the bill had explained that Title VII would not require an employer to maintain a racially balanced work force because,

> While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against. 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Senators Clark and Case).

Notwithstanding this assurance, opponents of the bill continued to argue "that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group." Id. at 9881 (remarks of Senator

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3/ Cont'd

respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such

Allott). To put these doubts to rest, Senator Allott proposed an amendment precluding a finding of unlawful discrimination "solely on the basis of evidence that an imbalance exists ..., without supporting evidence of another nature that the respondent has engaged or is engaging in such practice." Id. at 9881-82. The sense of this amendment was incorporated, in the language of §703(j), as part of the Dirksen-Mansfield compromise which resulted in the end of the Senate debate and the enactment of the Civil Rights Act of 1964. As Senator Humphrey explained in presenting the compromise amendments to the Senate,

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. Id. at 12723.

3/ Cont'd

race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. §2000e-2(j).

This legislative history does not indicate that Congress intended to forbid race-conscious numerical action to correct the effects of past discrimination. The concern of Congress in enacting §703(j) was not directed to the question whether race could be taken into account for remedial purposes; rather, its intent was to ensure that findings of discrimination would not be based solely on evidence of statistical imbalance and thereby to allay the fear that Title VII would have the effect of requiring employers to maintain a specific racial balance of employees.[4/] The language of §703(j), like that of

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4/ Senators Clark and Case also stated that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong. Rec. at 7213. See also id. at 6549 (remarks of Senator Humphrey). Senator Allott believed that "a quota system of hiring would be a terrible mistake," but did not indicate whether such a system would be unlawful. Id. at 9881-82. These statements may indicate an intention to prohibit employers from deliberately maintaining a particular racial composition of employees as an end in itself, but they do not suggest any inten-

§703(h), does not restrict or qualify otherwise appropriate remedial action but defines what is and what is not an illegal discriminatory practice. Cf. Franks v. Bowman Transportation Co., supra, 424 U.S. at 758-62. Indeed, the legislative history of the 1964 Act shows no detailed consideration of the scope and nature of remedial actions which might be taken by employers and unions or ordered by the courts, and it shows no consideration whatever of the permissibility of race-conscious remedial measures. See generally, EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964. There is no indication that "in the absence of any consideration of the question, ... Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends." Bakke, supra, 57 L.Ed.2d at 803 n.17 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

4/ Cont'd

tion to foreclose "the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination." Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 803 n.17 (1978) (opinion of Brennan, White, Marshall, Blackmun, JJ.).

B. Judicial and Executive Interpretations: 1964-1972

In the years following the enactment of Title VII, the courts and federal executive agencies recognized that Congress had not intended to outlaw one of the most effective means of remedying past discrimination, and accordingly they interpreted Title VII to permit, and in some instances to require, the use of race-conscious numerical remedies. The courts held that §703(j) could not be construed as a ban on such remedies: "Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." United States v. Local 38, IBEW, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Title VII was held to authorize remedial orders requiring union referrals of one black worker for each white worker,[5/] specific percentages of blacks in regular apprenticeship classes and special apprenticeship programs for blacks only,[6/] and preferential work registration, examination, and referral procedures for blacks with experience in the construction industry.[7/] As the Second Circuit stated in summarizing these decisions, "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Wood Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), cert. denied, 412 U.S. 939 (1973).[8/]

5/ Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969).

Also during the pericd between the enactment of Title VII in 1964 and its amendment in 1972, the Department of Labor determined that numerical goals and timetables were necessary to implement

6/ United States v. Ironworkers Local 86, 315 F.Supp. 1202, 1247-48 (W.D. Wash. 1970), aff'd, 443 F.2d 544, 553 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

7/ United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 133 (8th Cir. 1969).

8/ The courts of appeals in eight circuits have upheld the authority of the district courts to order race-conscious numerical relief under Title VII or other federal fair employment laws, see nn. 94-95 , infra.

the equal employment opportunity and affirmative action obligations of government contractors under Executive Order No. 11,246, and that a permissible method of meeting the goals and timetables in the construction industry was the hiring of one minority craftsman for each nonminority craftsman. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723, 739-43 (1972). Both the Department of Labor[9/] and the Department of Justice[10/] found no conflict between such race-conscious measures and the provisions of Title VII. The courts agreed, holding that §703(j) did not impose any limitation on actions taken pursuant to the Executive Order program and that,

> To read §703(a) in the manner suggested by the plaintiffs, we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action

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9/ Office of the Solicitor, U.S. Department of Labor, Legal Memorandum, in Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255, at 274 (1969).

10/ 42 Op. Att'y Gen. No. 37 (Sept. 22, 1969).

> under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 (3rd Cir.), cert. denied, 404 U.S. 854 (1971).

See also Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972), and cases cited therein. Thus, by the time Congress considered the 1972 amendments to Title VII, it was well established that the 1964 Act permitted race-conscious remedial action.

C. Legislative History: 1972

In amending Title VII by the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Congress approved these interpretations of Title VII. Congress was aware that

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act

> discriminatory practices through various institutional devices, and testing and validation requirements. S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971).

The committee reports specifically cited cases which had approved race-conscious solutions for these complex and pervasive problems. See, e.g., id. at 5, n.1; H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8 n.2, 13 n.4 (1971). And, in a section-by-section analysis presented to the Senate with the conference report, the Senate sponsors of the legislation stated that,

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 3460-63 (1972), reprinted in EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844.

See Bakke, supra, 57 L.Ed.2d at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

Moreover, with full awareness of the judicial decisions interpreting Title VII to permit the remedial use of race, Congress not only confirmed but expanded the remedial authority of the courts by amending §706(g) to provide expressly that appropriate affirmative action under that section "is not limited to" reinstatement, hiring, and an award of back pay, and that a remedial order may

include "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). See Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 759 n.189.

Finally, "Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11,246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action." Bakke, supra, 57 L.Ed.2d at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.). The detailed history of the Dent and Ervin amendments and their rejection by the House and Senate has been documented elsewhere and need not be repeated here. See Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 751-57. See also, Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Local 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973). In sum, "[e]xecutive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race." Bakke, supra, at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

D. EEOC Guidelines on Affirmative Action

The Equal Employment Opportunity Commission recently codified and reaffirmed this interpretation of Title VII in its Guidelines on Affirmative Action, 44 Fed. Reg. 4421-30 (Jan. 19, 1979), 29 C.F.R. Part 1608. These guidelines were proposed in part to encourage voluntary compliance by "authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII." Bakke, supra, 57 L.Ed.2d at 818 n.38 (opinion of Brennan, White, Marshall, Blackmun, JJ.). Under the guidelines an employer or union, following a reasonable self-analysis of its practices which discloses a reasonable basis for concluding that action is appropriate, may voluntarily take reasonable affirmative action including the use of "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees." 29 C.F.R. §1608.4(c). Such action may be taken where there is a reasonable basis for believing that it is an appropriate means of, inter alia, correcting the effects of past discrimination, eliminating

the adverse impact on minorities of present practices, or terminating disparate treatment. 29 C.F.R. §§1608.3, 1608.4(b). It is not necessary for an employer or union to establish that it has violated Title VII in the past; there is no requirement of an admission or formal finding of past discrimination, and affirmative action may be taken without regard to arguable defenses which might be asserted in a Title VII action brought on behalf of minorities. 29 C.F.R. §1608.4(b). See Section II A, infra. The guidelines recognize that

> Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII. Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary

> action, and those taking such action should be afforded ... protection against Title VII liability .... 29 C.F.R. §1608.1(c).

These guidelines "constitute 'the administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431; Griggs v. Duke Power Co., supra, 401 U.S. at 433-34. The degree of deference to be accorded to such an interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

When judged by these standards, the Guidelines on Affirmative Action are entitled to great weight. First, the EEOC's careful and thorough consideration is evident: the proposed guidelines were intitally issued on December 28, 1977, 42 Fed. Reg. 64,826; comments were received from almost 500 individuals and organizations; the

Commission considered this Court's opinions in the Bakke case before taking any final action; and substantial changes were made before the Commission voted to approve the guidelines in final form on December 11, 1978. See Supplementary Information: An Overview of the Guidelines on Affirmative Action, 44 Fed. Reg. at 4422-23. The EEOC's extensive consideration of the comments, the legal authorities, and the precise wording of the guidelines is reflected in some detail in the overview issued with the final guidelines. Id. at 4422-25. Second, the validity of the reasoning set forth in the guidelines is apparent from the legislative history of the 1964 enactment and the 1972 amendment of Title VII, as well as from judicial and other executive agency interpretations of the statute. See pp. 18-21, supra. Finally, the guidelines are fully consistent with prior interpretations of Title VII by the EEOC expressly approving "[n]umerical goals aimed at increasing female and minority employment" as "the cornerstone of . . . a[n affirmative action] plan." EEOC Decision 74-106, 10 FEP Cases 269,

274 (April 2, 1974); EEOC Decision 75-268, 10 FEP Cases 1502, 1503 (May 30, 1975). See also, Equal Employment Opportunity Coordinating Council, Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (Sept. 13, 1976), reaffirmed and extended to all persons subject to federal equal employment opportunity laws and orders in the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,300 (Aug. 25, 1978), 29 C.F.R. §1607.13B.

II. A STANDARD PERMITTING EMPLOYERS AND UNIONS TO TAKE RACE-CONSCIOUS AFFIRMATIVE ACTION WHEN THEY HAVE A REASONABLE BASIS TO DO SO IS CONSISTENT WITH TITLE VII AND THE CONSTITUTION

A. An Employer or Union May Take Race-Conscious Affirmative Action Where It Acts upon a Reasonable Belief that Such Action Is Appropriate

An employer when considering whether to institute a race-conscious affirmative action plan, or a court when reviewing a challenge to such a plan, need only determine that there is a reasonable basis for the plan in order to conclude that the plan is lawful. The employer is not required to admit that it had engaged in unlawful

prior discriminatory practices or to submit evidence sufficient for a court to find that the employer had violated the fair employment laws in order to justify the institution of the plan. EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.1(c). See Section I D, supra. A rigid standard requiring conclusive proof of prior discrimination would largely eliminate voluntary affirmative action, see pp. 32-34, infra. The circumstances which constitute a reasonable basis for instituting an affirmative action plan vary according to the particular employment situation. However, an employer or union may develop a race-conscious affirmative action plan when there is reason to believe that such action is appropriate, inter alia, (1) to provide a remedy for prior discriminatory practices of the employer or union, (2) to insure the legality of current practices, (3) to provide a remedy for discriminatory practices related to the business of the employer or union, or (4) to comply with Executive Order No. 11,246 or other legal requirements for affirmative

action. 11/ Moreover, the action undertaken must be reasonably related to the identified problems which justify the institution of the plan, see Section III B, infra.

In enacting Title VII Congress selected "[c]ooperation and voluntary compliance ... as the preferred means for achieving" the elimination of discrimination in employment. Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44. The standard for determining whether an affirmative action plan is lawful under Title VII must similarly encourage voluntary compliance and voluntary action. The standard adopted by a majority of the court below, which would require an employer to admit that it was guilty of unlawful discriminatory practices or to submit conclusive proof of such practices before it could lawfully institute an affirmative action plan, would frustrate the purposes of Title VII.

11/ Of course, in certain circumstances an employer or union may be required to institute an affirmative action program. The justifications for race-conscious affirmative action which are listed are not exclusive but rather those that are relevant to the affirmative action plan designed by Kaiser and the Steelworkers.

> [T]he standard produces ... an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action ... [T]he defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. G. Pet. 32a-34a12/ (Wisdom, J., dissenting).13/

12/ This form of citation refers to the petition for a writ of certiorari filed by the United States and the Equal Employment Opportunity Commission.

13/ Ironically, if the applicable standard were to require conclusive proof or an admission of prior discrimination, then the back pay remedy which the Court indicated should provide a "spur or catalyst" for voluntary compliance, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-18, would instead provide a barrier to voluntary compliance. The admission of prior discrimination or the submission of conclusive proof of discrimination would serve as an open invitation for a suit seeking back pay by black workers. The failure of the company to admit or to prove conclusively its prior discrimination would serve as an equally open invitation for a suit seeking back pay in addition to injunctive relief by white workers. If whenever undertaking affirmative action employers were confronted with monetary liability to one group of workers or the other,

The "high tightrope" that employers are required to walk by the Fifth Circuit's standard is illustrated by Kaiser's experience with Title VII suits at its three plants in Louisiana -- at Baton Rouge, Chalmette and Grammercy. Black workers at both the Chalmette and the Baton Rouge plants brought lawsuits alleging Title VII violations. In the Chalmette suit, the Fifth Circuit reversed the district court's dismissal of the complaint because it found on facts remarkably similar to those at the Grammercy plant that a prima facie violation of Title VII had been established. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389-90 (1978). In the

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13/ Cont'd

employers would refrain from ever taking affirmative action.

"Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law." Bakke, supra, 57 L.Ed.2d at 818 (Brennan, White, Marshall, Blackmun, JJ.); see McDaniel v. Barresi, 402 U.S. 39 (1971).

Baton Rouge suit, the parties, after lengthy litigation and discovery procedures,[14] entered into a settlement which provided that Kaiser pay $255,000 in monetary relief to the plaintiff class and an additional amount in attorneys' fees. Burrell v. Kaiser Aluminum & Chemical Corp., Civil Action No. 67-86 (M.D. La.) (consent decree filed Feb. 24, 1975). Kaiser's experience with the Title VII suits brought by black workers in its plants in Louisiana and its review of suits brought against other companies acted -- as intended by this Court in Albemarle Paper -- as a "spur or catalyst" for change.[15] In the third plant, at Grammercy, where Kaiser adopted an affirmative action plan designed to remedy possible prior violations and to forestall a lawsuit brought on behalf of black workers, see Section IIIA, infra, it was subjected to this lawsuit by

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14/ See, e.g., Burrell v. Kaiser Aluminum and Chemical Corp., 408 F.2d 339 (5th Cir. 1969) (per curiam), rev'g 287 F.Supp. 289 (E.D. La. 1968).

15/ The superintendent for industrial relations at the Grammercy plant noted that "the OFCC, the EEOC, the NAACP, the Legal Defense Fund [had all] been into the [Baton Rouge] plant, and as I was saying, whatever their remedy is believe me, it's one heck of a lot worse than something we can work out ourselves." A. 83-84, see p. 58 n. 26, infra.

Brian Weber alleging reverse discrimination. The Fifth Circuit's rigid standard, requiring conclusive proof or an admission of prior discriminatory practices, would not only result in less voluntary compliance but would also result -- as indicated by Kaiser's experience in Louisiana -- in the filing of the court dockets with Title VII suits.[16/] See G. Pet. 32a (Wisdom, J., dissenting).

Race-conscious affirmative action is justifiable if an employer or a union has a reasonable basis for believing that it might otherwise be

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16/ There was a "staggering" increase in the number of Title VII cases filed between 1970 and 1976: from 344 employment cases filed in fiscal year 1970 to 5,321 in fiscal year 1976. Administrative Office of the United States Courts, 1976 Annual Report of the Director, at 107-08. This increase is understandable in light of the facts that the coverage of Title VII was broadly expanded by the Equal Employment Opportunity Act of 1972, see e.g., Chandler v. Roudebush, 425 U.S. 840, 841 (1976), and that the interpretation of Title VII on numerous issues was first clarified during this period. See e.g, Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

held in violation of Title VII. An affirmative action plan may be used to remedy the effects of possible prior discriminatory practices or to prevent possible continuing discriminatory

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16/ cont'd

This enormous growth rate in Title VII filings slowed after fiscal year 1976. While there was an increase of 1,390 filings or of 35.4% from FY 1975 to FY 1976 (3,931 filings as compared to 5,321 filings), in FY 1977 there was an increase of 610 filings or of 11% to 5,931. Administrative Office of the United States Courts, 1977 Annual Report of the Director, at 112. In FY 1978 there was a decrease of 427 filings or of 7% (from 5,931 to 5,504 filings). Administrative Office of the United States Courts, 1978 Annual Report of the Director, at 88.

While it is difficult to draw hard conclusions from the dramatic change in the rate of Title VII case filings from a "staggering" increase to a decrease, it may be inferred that the clarifications in the law and the emphasis on voluntary affirmative action were beginning to have an effect. If voluntary affirmative action is severely restricted — as it would be if the Fifth Circuit is affirmed -- then the remedy for employment discrimination would lie primarily in the courts and not in voluntary resolution, and a return to a substantial increasing rate of Title VII cases could be expected.

practices.[17] This Court has held that a statistical disparity resulting from a facially neutral practice is sufficient to establish a prima facie disparate impact violation of Title VII, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); and that gross statistical disparities alone may be sufficient to constitute a prima facie showing of intentional discrimination, Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977). Accord-

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17/ "If the self analysis shows that one or more employment practices: (1) have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self-analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.4(b); see also §1608.3(b).

ingly, employers and unions may rely on statistical analysis in determining whether there is a reasonable basis for taking affirmative action.[18] Where, as in this case, the statistical analysis indicates a prima facie showing that the employer's prior practices were discriminatory and that, if the employer did not take race-conscious affirmative action, its continuing practices would be discriminatory, see pp. 82-85, infra, the employer has a reasonable basis for taking such action.

But the analysis need not demonstrate that there is a prima facie case in order for race-conscious action to be justifiable. Requiring an employer to demonstrate a prima facie case would frustrate voluntary compliance and the effective implementation of private remedies for discriminatory practices for the same reasons, although not quite as severely, as requiring the employer to admit that it had engaged in dis-

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18/ "The effects of prior discriminatory practices can be initially identified by a comparison between the employer's workforce, or a part thereof, and an appropriate segment of the labor force." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.3(b). See also §§1608.3(a), 1608.4(a).

criminatory practices.[19] In order to justify race-conscious affirmative action an employer need only show that it had a reasonable basis for believing that, in the absence of such action, it might be held in violation of Title VII.

Furthermore, an employer or union may take race-conscious action to remedy the disadvantages affecting minorities as a result of the discriminatory practices of other companies or unions or as a result of governmental or societal discrimination.[20] Such action is particularly

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19/ Neither Kaiser nor the Steelworkers argued in the district court that there was a prima facie case of discrimination even though it is apparent that such an argument was readily available, see pp. 56-58, infra. In fact, the parties did not introduce important but available evidence which would have confirmed the prima facie showing, see p. 60 n. 27, infra. The reason for the omission is obvious: by proving or almost proving prior discrimination, the parties would invite a suit brought on behalf of black workers which would involve the parties in the complex litigation which they had sought to avoid by agreeing to the affirmative action plan.

20/ "Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands

necessary where, as is the case with skilled craftsmen, see pp. 89-104, infra, there is a limited pool of available minorities because of a history of discrimination by employers, by unions, by educational institutions and even by law. See EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.3(c). If the pervasive, complex, and systemic discriminatory practices in this country -- and their socially dangerous effects, such as the disproportionate unemployment rate among minorities -- are ever to be undone, employers must be encouraged to undertake socially responsible affirmative action. See Bakke, supra, 57 L.Ed.2d at 844-45 (Blackmun, J.).

It is almost inevitably the case that employers like Kaiser become part and parcel of the general practices of discrimination. When Kaiser selected from a pool of skilled craftsmen to which minorities had limited access because of discriminatory business, union, and vocational

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20/ Cont'd

other than their own, such an objective is perfectly consistent with the remedial goals of the statute." Bakke, supra, 57 L.Ed.2d at 804 n.17 (opinion of Brennan, Marshall, White, Blackmun, JJ.).

training practices, it relied on and, in effect, supported the discriminatory practices of others. Reliance on the discriminatory policies of others which has an adverse impact on minorities, whether done intentionally or simply without sufficient business justification, may constitute a violation of Title VII.[21/] At the very least, a company which has relied on the discriminatory practices of others should be encouraged to take action which would effectively eliminate that reliance and correct the adverse racial effects caused by those practices.

21/ See, e.g., Griggs v. Duke Power Co., supra, 401 U.S. at 430 ("Because they are Negroes, petitioners have long received inferior education in segregated schools...." The petitioners' Title VII rights were violated because the company instituted education and testing requirements which were not job-related and which failed blacks more frequently than whites as a result of the discrimination in education); Bakke, supra, 57 L.Ed. 2d at 819 ("[O]ur cases under Title VII ... have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination.") (Opinion of Brennan, White, Marshall, Blackmun, JJ.).

Finally, an employer which is a qualifying government contractor may, and indeed must, undertake affirmative action to comply with the requirements of Executive Order No. 11,246. In enacting the Equal Employment Opportunity Act of 1972, Congress specifically considered and rejected efforts to outlaw the use of numerical, race-conscious plans under the Executive Order program. See Section I C, supra; Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 751-57. Race-conscious action which is undertaken in good faith reliance on the Executive Order is not only permissible under Title VII but furthers the purposes of Title VII. EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.5.[22/]

B. An Action to Enforce the Fifth Circuit's Construction of Title VII Would Not Present a "Case or Controversy"

The court of appeals held, and respondent apparently agrees, that the Company and Union

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22/ Regardless of the justification for race-conscious affirmative action, the measures undertaken must be appropriately designed to remedy the identified problems. The standards for determining appropriate action are discussed in Section III B, infra.

could have successfully defended this action if they had alleged and proved that they had discriminated on the basis of race against black employees or applicants. The defendants made no effort to present this defense; on the contrary, they claimed that they had not discriminated against blacks. The evidence adduced by the defendants on this issue was apparently intended to show the absence of past discrimination against blacks, and thus supported the claims and interests of the plaintiff rather than of the defendants themselves. The defendants were in possession of a variety of evidence showing past discrimination against blacks, including the OFCC letter described in n. 42, infra, but they failed to introduce the evidence into the record. Although the scanty evidence that was placed in the record strongly suggested a history of discrimination against blacks, counsel for the defendants consistently declined to press such an inference or to urge such a defense. Despite this peculiar state of affairs, the courts below attempted to make a factual finding as to whether or not there had been such a history of discrimination.

What occurred in this instance is not unique, but seems an inherent difficulty with cases of this sort. As the Company candidly notes, no employer "can be expected to confess to past discrimination in order to justify a challenged racial preference." Petition, No. 78-435, p. 11. Such a confession would give rise to potentially massive liability to black employees and applicants for back pay and/or punitive damages. See pp. 31-34, supra. No employer will seek to prove liability to a large number of minorities or women merely to avoid liability to a white male. The same dilemma exists outside of the employment area.

An action which can only be fully defended by establishing liability to third parties, and which as a consequence will not be so defended, does not present a "case or controversy" within the meaning of Article III. The parties to a proceeding in federal court must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends ..." Baker v. Carr,

369 U.S. 186, 204 (1962). The nature of the interests of each party should assure that they will "frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously." Barlow v. Collins, 397 U.S. 159, 172 (1970) (Brennan, J., concurring). The courts are unequipped, in the absence of such competing interests, to resolve factual questions which usually require discovery and a contested evidentiary hearing. These considerations are of particular import where, as here, upholding plaintiff's undefended claim of non-discrimination would adversely affect the interests of third parties, the black workers.

Previous standing decisions have focused on whether the plaintiff has a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution ...." Sierra Club v. Morton, 405 U.S. 727, 731 (1972). That requirement is as applicable to a defendant as it is to a plaintiff, for the necessary vigorous contest of issues requires two competing parties. This Court has

repeatedly held that a party lacks standing to litigate an issue if success in the litigation will not accrue to its benefit. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). A fortiori the required interest is lacking where success in the litigation will operate to the disadvantage of the "prevailing" party. Even where the plaintiff himself has standing to bring an action, it must be brought against a party with standing to defend it.

An adversary relationship does exist between the parties to this case as to the ultimate outcome -- whether the defendants can continue their affirmative action program. But the purpose of the case or controversy requirement is to insure that the parties will aid the court by vigorously contesting each of the subsidiary issues of law and fact which the court must decide. Ordinarily a controversy as to the ultimate issue will be adequate to prompt the parties to controvert all reasonably disputable subsidiary issues. But a dispute as to the outcome of the action is insufficient to create a

"case or controversy" where there are no adverse interests as to a critical question of law or fact.

Were it possible for an action such as this to proceed as it did below, with the judges left to their own devices to determine if there was past discrimination against blacks, it would be equally permissible for the defendants to join the plaintiff in a formal stipulation that there had never been such discrimination. Of course, the courts would not be bound by a stipulation that was contrary to the truth, and the courts will not decide a question presented by "stipulated" facts that are not the case. Swift & Co. v. Hocking Valley R.R. Co., 243 U.S. 281, 289 (1917). But the courts would have no way of ascertaining the accuracy of such a stipulation. Stipulations are ordinarily accepted because the courts can rely on the adverse interests of the parties to assure that stipulations will only be agreed upon if true; no such presumption can be relied upon where, as here, it is in the interests of all parties to agree there is no history of discrimination.

An action against a defendant who lacks any adverse interest in a key factual issue poses Article III problems similar to those presented by "friendly actions" which this Court has consistently refused to decide. United States v. Johnson, 319 U.S. 302, 305 (1943) (no "honest and actual antagonistic assertion of rights"); Lord v. Veazie, 8 How. 251, 254-55 (1850). Regarding the question of past discrimination "the plaintiff and defendant have the same interest, and that interest [is] adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question ... was decided in the manner that both of the parties to this suit desire it to be." Lord v. Veazie, supra, 8 How. at 255. The instant case bears a substantial resemblance to Chicago etc. R.R. v. Wellman, 143 U.S. 339 (1892), an action between a railroad and passenger regarding the validity of state price regulation which this Court dismissed at the suggestion of the state. Even though there was no claim or evidence of collusion, the Court thought it inappropriate to decide a case in which the amicable relationship

between the parties resulted in an abortive trial of complex factual issues, lacking "presentation of all the facts from the lips of witnesses, and a full inquiry into them...." 143 U.S. at 345. In such a case the intervention of an interested party does not confer on the court jurisdiction which it originally lacked. United States v. Johnson, supra.

We suggest that these difficulties will exist under any construction of Title VII which requires the defendant in a case such as this to adduce evidence or make allegations which entail a "real and appreciable" danger of increasing the likelihood that the defendant will be held liable to third parties, including black workers or the United States. See Marchetti v. United States, 390 U.S. 39, 48 (1968). Clearly such a defendant cannot be required to prove it was guilty of discrimination. Neither can it be forced to adduce a prima facie case of past discrimination, for such a prima facie case would shift to the employer the burden of proof in any subsequent action by minority employees or applicants. Teamsters v. United States, supra, 431 U.S. at

359-62; Franks v. Bowman Transportation Co., supra, 424 U.S. at 772. Similarly a defendant cannot be asked to admit and to prove that it had believed it was discriminating against blacks, for such an admission might provide grounds for an award of punitive damages. See Carey v. Piphus, 55 L.Ed.2d 252, 260-61, n.11 (1978). The standard we set out in part II A, unlike the Fifth Circuit's construction of Title VII, poses none of these Article III problems.

C. The Fifth Circuit Has Given Title VII an Unconstitutional Construction

The Fifth Circuit construed Title VII to prohibit race-conscious remedies to correct "societal discrimination", a phrase which denoted discrimination by anyone other than the defendants themselves. As this Court has consistently recognized, race-conscious policies are frequently "the one tool absolutely essential" for redressing past discrimination. North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971). Thus, under many if not most circumstances Title VII, as construed below, would prohibit any meaningful

effort by an employer to provide redress for discrimination by other employers, or by state, local or federal officials. Any such prohibition would violate the Fifth Amendment, which applies to federal legislation the same constraints applicable to the states under the Equal Protection Clause. See Bolling v. Sharpe, 347 U.S. 497 (1954).

A blanket prohibition against race-conscious redress of discrimination by others would be neutral on its face. But, like the prohibition in Hunter v. Erickson, 393 U.S. 385 (1969), it would be far from neutral in its operation. It would not deny to whites any remedies which they now enjoy, for whites have never been subject to the long-standing pervasive discrimination that has been inflicted on blacks and certain other minorities. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954). Not only, as in Hunter, do whites not need such redress, but as a practical matter they would not qualify for it were it available to all victims of discrimination. Title VII, moreover, would not prevent an employer from using a beneficent quota or program to help people who suffered in the past from physical disabilities, illness,

or discrimination on the basis of age or political views. Only women and racial minorities as a practical matter would be cut off from such assistance. The prohibition created by the Fifth Circuit is far more restrictive than that in Hunter, in which the Court struck down a city charter provision that established special requirements for enacting an open housing ordinance but still permitted the adoption of one. Here the purported prohibition against race-conscious employer redress is absolute.

Both the states and federal government are free to enact, and repeal, laws providing remedies for victims of discrimination. Railway Mail Association v. Corsi, 326 U.S. 88 (1945). But this Court has never upheld legislation prohibiting voluntary steps to provide such redress. Certainly the remedial measures required by the Constitution of a public entity to redress its own discrimination cannot be prohibited. North Carolina Bd. of Ed. v. Swann, supra. We submit that voluntary private action to redress the discrimination of others is also protected by the Fourteenth Amendment. The Thirty-Ninth Congress which framed the Fourteenth Amendment clearly approved the numerous private organiza-

tions, generally known as Freedmen's Societies, which were actively engaged after the Civil War in providing special relief and assistance, including education and job training, to blacks. That Congress enacted a series of race-conscious federal programs intended to operate jointly with those private efforts and the Fourteenth Amendment, was seen as providing a constitutional basis for this federal activity.[23/] Moreover, the men who framed the Amendment acted against a long history of federal efforts under the Fugitive Slave Act to prohibit private assistance to runaway slaves,[24/] and were determined to reverse the past role of the federal government from obstructing to assisting such private efforts.

For the first century after Emancipation, private race-conscious voluntary action to remedy discrimination by others was virtually

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23/ Brief of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, No. 76-811, pp. 10-53.

24/ J. tenBroek, Equal Under Law, 57-65 (1951); the 1850 Fugitive Slave Act provided civil and criminal liability for anyone assisting a runaway slave. 11 Stat. 462, § 7.

the only form of redress available to blacks. Today such activities remain of vital importance. Congress could not conceivably prohibit charities or private foundations from attempting through race-conscious programs to alleviate the effects of discrimination. In 1963 an employer in Louisiana, had it had the courage to break with local prejudice, could have offered employment to a black man or woman in a good faith effort to redress in a limited way a lifetime of discrimination at the hands of state officials or other private employers. Congress did not have the power to prohibit such a beneficent act, and there is no reason to believe it intended to do so.

Even if Title VII as construed by the Fifth Circuit is not unconstitutional per se, it certainly would be in many instances. As construed below Title VII prohibits a private employer from using a race-conscious program to remedy unconstitutional discrimination by state or federal officials. Both state and federal officials were involved in the funding and supervision of the Louisiana vocational schools which, as we note infra pp. 93-95, denied certain craft training

to blacks because of their race; the history of de jure discrimination in Louisiana public schools is well known. The likely impact of these practices on blacks who might have sought work at Kaiser is readily apparent. Cf. Gaston County v. United States, 395 U.S. 285 (1969). For most of the victims of that government discrimination the only effective remedy available would be the sort of training and employment program offered by Kaiser; to forbid that would be to perpetuate the very discrimination which the Fourteenth Amendment was enacted to prohibit.

But an employer could not ordinarily determine whether the past discrimination whose burden an applicant still bore was sufficiently tainted by state action to place it outside the permissible scope of Title VII. "The question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer," Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 172 (1972). An employer cannot reasonably be expected to conduct the necessary investigation into the history of each applicant and of

the state where he or she was educated and trained. If required to guess at its peril whether the past discrimination inflicted on a particular applicant involved state action, the possibility of liability to a rejected white would deter all but the hardiest of employers from providing race-conscious redress to any blacks at all. Such a chilling effect on constitutionally protected activity is impermissible. See N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

Title VII, moreover, now applies to state and local governments; in the Fifth Circuit's view Louisiana and New York are also forbidden to use race-conscious employment programs to aid victims of private discrimination in their own states or public discrimination in any other state. National League of Cities v. Usery, 426 U.S. 833, 847 (1976), expressly warned against federal interference with voluntary local affirmative action plans, and Gaston County noted that, where neutral state practices would perpetuate past discrimination, there seemed little "legal significance" to whether that discrimination had occurred in another state. 395 U.S. at 293 n. 9.

Title VII could not constitutionally restrict the power of a state or local government to remedy such discrimination by, for example, the 1973 Louisiana statute requiring that affirmative action be taken in filling new positions in vocational training schools "[w]henever the ratio of members of the minority to majority race employed at all levels in the schools is substantially out of keeping with the minority to majority race ratio of persons in the region...." La. Rev. Stat. Ann. §1996C. Title VII should be construed to avoid this difficulty, and, since the statute on its face makes no distinction between public and private employers, the same construction should apply to both.

III. THIS AFFIRMATIVE ACTION PLAN IS PERMISSIBLE UNDER TITLE VII

A. The Plan Was Properly Instituted

The Industrial Relations Superintendent for Kaiser's Grammercy plant stated in general terms the reasons why Kaiser and the Steelworkers instituted their plan:

> ... the Company ... [and] the Union, looked around and read the Court decisions being made. We looked at the settlement that had just been made with the steel industry and the steel companies. We looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to speak of. A. 83.

While Kaiser neither admitted that it had discriminated in the selection of craftsmen nor introduced detailed evidence concerning its self-examination, the need to solve this "problem" -- when viewed in the light of Kaiser's employment practices -- justified, and even compelled, the adoption of an affirmative action plan. The joint Company-Union Committee[25/] which reviewed the representation of minority and female employees in the trade, craft and maintenance classifications in Kaiser plants agreed that this representation "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court

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25/ The Master Aluminum Agreement obligated a joint Company-Union committee to review the representation of minority and female employees in craft jobs. A. 139-55 (Joint Ex. 2). The parties did not introduce any evidence concerning the scope of that review.

decisions". A. 145 (Joint Ex. 2). 26/

Kaiser and the Steelworkers had four independent but interrelated justifications for the adoption of an affirmative action plan: (1) to provide a remedy for prior discriminatory practices; (2) to avoid engaging in current discriminatory practices; (3) to provide a remedy for the discriminatory practices of others in the training and development of craft workers; and (4) to ensure compliance with Executive Order 11,246.

1. Kaiser's Prior Discrimination. The district court determined that the evidence did not establish that Kaiser had discriminated either in hiring or in the selection of craft employees. G. Pet. 64a-65a. The court of appeals majority

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26/ Kaiser officials described in some detail the reasons why the affirmative action plan was necessary and lawful: (1) as a "direct result of employment discrimination over the years [and] the lack of opportunity on the part of the blacks . . .", black craftsmen were unavailable, A. 90 (Bouble), see also A. 93, 108 (Bouble), A. 63 (English) (specifically describing discrimination in the building trade programs); (2) recruiting efforts to attract a representative number of skilled black craftsmen had been unsuccessful, A. 91-92 (Bouble), A. 63 (English); (3) the Company

noted the district court's finding and stated that the "appellants [Kaiser and the Steelworkers] all but concede that Kaiser has not been guilty of any discriminatory hiring or promotion" practices (footnote omitted). G. Pet. 17a. Of course, as Judge Wisdom stated, "no litigant wanted to see past discrimination found." G. Pet. 34a. Certainly neither Kaiser nor the Steelworkers would directly admit prior discrimination against black workers in order to prevail in this lawsuit; such an admission would only invite a lawsuit by black workers which might result in substantial monetary liability, see pp. 31-34, supra.

The lack of adversity of interest among the parties concerning a central factual issue -- the existence, or a reasonable basis for believing

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26/ Cont'd

had a "fear of the consequences" of suits on behalf of black employees brought by private parties or the federal government, A. 84; (4) the Company had been under considerable pressure from the Office of Federal Contract Compliance, A. 93-94 (Bouble), see p. 105 n.86, infra; (5) the plan was considered "remedial . . . [for] discrimination in the past, not ours, per se, but the total sum and substance of education and training to obtain skills, that created a situation that called for a remedy such as the one we derived out of our discussions [with the Union]," A. 98 (Bouble).

in the existence, of prior discrimination -- raises serious questions concerning the justiciability of this action, see Section II B, supra. Moreover, the absence of any litigant with an interest in coming forward with proof of prior discrimination creates serious evidentiary problems which are illustrated by the failure of the parties in this case to introduce relevant and available evidence concerning the possible existence of prior discrimination.[27/] These evidentiary problems require that, in such cases as this, the courts must carefully scrutinize the evidence because it is not in the interest of any

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27/ For example, the parties did not introduce any evidence on the following important issues concerning the question of prior discrimination at the Kaiser plant: (1) the findings by the Office of Federal Contract Compliance concerning the discriminatory practices at Kaiser and its recommendation for remedying the effects of those practices, see pp. 104-05, infra; (2) the existence of segregated facilities; (3) the racial composition of the supervisory staff and whether there were any controls concerning the exercise of supervisory discretion, see p. 78 n.42, infra; (4) the census data concerning the availability of skilled craft workers in the labor force, see p. 67 n.31, infra; (5) actual job descriptions,

party to develop a full factual record on the possible existence of prior discrimination. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1296-97 (1976). Furthermore, the courts in such cases should use their full authority to take judicial notice of relevant facts:

> Appellate courts have a special need to resort to facts not found in the record. When the question before the Court is not merely the rights of the parties, but the

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27/ Cont'd

qualifications and pay rates for craft jobs; (6) the qualification standards, employment testing, education requirements, etc., if any, which Kaiser has used in selecting applicants for hire, see pp. 81-83, infra; (7) the actual application of the standards for the selection of craftsmen prior to 1974, see p. 78 n.42, infra; (8) any justification for the use of a five or three year "prior industrial experience" requirement for selection as a craftsman prior to 1974, see p. 69, infra; (9) the date when the five year experience standard for hire into the craft positions was reduced to three years, see p. 70 n.32, infra; (10) the details, including the chronology, of Kaiser's self-described active recruiting efforts for black craftsmen, see p. 77 n.41, infra; (11) the method for the selection of craftsmen in 1974 which appears to be in violation of the affirmative action plan, see p. 111, infra.

> interests of others who may be affected by the rule the Court makes to govern the case, it would be foolish for the Court to rely only on the evidence the parties have chosen to prove below.28/

In this case, and in others like it, it is critical that the courts take proper judicial notice of relevant facts because the litigants do not have an interest in the full presentation of the evidence; the substantial rights of persons who are not parties to the lawsuit are affected; and the authority of the federal government to achieve the national policy of equal employment opportunity is at issue.29/

28/ 21 Wright and Graham, Federal Practice and Procedure §5102 at 462-63 (1977); see also Weinstein, 1 Evidence ¶200[03].

29/ The Court extensively relied on judicial notice in an analogous case, Regents of the University of California v. Bakke, supra, 57 L.Ed.2d at 784-88, 790-92 (opinion of Powell, J.), 821-26 (opinion of Brennan, White, Marshall, Blackmun, JJ.). See also, Roe v. Wade, 410 U.S. 113, 130-147, 149 (1973); Keyes v. School District No. 1, 413 U.S. 189, 197 (1973); Beauharnais v. Illinois, 343 U.S. 250, 258-61 (1952); Moore v. East Cleveland, 431 U.S. 494, 508-09 & n.4 (1977) (Brennan, J., concurring); cf. United States v. Carolene Products Co., 304 U.S. 144, 148-50 (1938).

The evidence, when properly viewed, indicates that Kaiser had a reasonable basis for believing that it had engaged in discriminatory practices and that it was required to formulate a remedial affirmative action plan. Moreover, the evidence establishes, contrary to the legal conclusion of the district court, a prima facie case of discrimination with respect to (a) Kaiser's selection of craftsmen, (b) Kaiser's operation of the craft training program prior to 1974, and (c) Kaiser's employment of industrial workers. However, since the proper standard is whether Kaiser had a reasonable basis to believe that its practices were discriminatory and not, as the lower courts held, whether there was sufficient proof to establish a violation of the fair employment laws, it is not necessary to reverse the conclusion of no discrimination -- although incorrect -- in order to reverse the judgment.

Statistical proof plays an important role in judicial and administrative determinations of whether practices violate the fair employment laws. Similarly, a statistical analysis may provide a reasonable basis for an employer to conclude that its prior employment practices were

discriminatory and that affirmative action is appropriate. See pp. 36-37, supra. In contested litigation, evidence of statistical disparity may provide the basis for a prima facie showing of discrimination within two separate theoretical frameworks. Under the first theory, that of adverse impact, the plaintiff "need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, supra, 433 U.S. at 329. "There is no requirement ... that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." Id. at 330. If adverse impact of the standard is demonstrated, the employer must meet "the burden of showing that any given requirement [has] ... a manifest relationship to the employment in question." Griggs v. Duke Power Co., supra, 401 U.S. at 432. Once the employer meets this burden, the plaintiff may then show that other standards which have less or no discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425.

Under the second theory, that of disparate treatment, proof of discriminatory motive is required but in some circumstances motive can be inferred from the "mere fact of differences in treatment," Teamsters v. United States, supra, 431 U.S. at 335 n.15, 339-340 n.20; the significance of this difference may be demonstrated by a statistical evaluation, Hazelwood School District v. United States, supra, 433 U.S. at 308-09 n.14, 311 n.17. The burden then shifts to the defendant to demonstrate that the plaintiff's proof is "either inaccurate or insignificant." Teamsters v. United States, supra, 431 U.S. at 360. Evaluation of the statistical evidence here indicates that there was a reasonable basis to believe that Kaiser discriminated in its practices regarding the selection and training of craftsmen and the employment of industrial workers under both the adverse impact and the disparate treatment theories.

a. Selection of Craftsmen. Prior to the institution of the affirmative action program Kaiser employed 273 craft workers at its Grammercy

plant, of whom only 5 or 1.83% were black.[30/] A. 167 (K. Ex. 3). The large majority of these craftsmen were employed "off the street" rather than being trained at the plant; only 28 craftsmen were trained by Kaiser prior to 1974. See p. 79, infra. In order to be hired as a craftsman, an applicant was required to have five years of "prior industrial experience"; this requirement was reduced, at some unspecified time, to three years. A. 70 (English).

Kaiser obtained most of its workforce from two parishes, St. James and St. John the Baptist, which had a combined general population which was 46% black, and a workforce which was 39% black.

30/ The Superintendent of Industrial Relations at Kaiser's Grammercy Plant, Dennis English, testified that prior to the 1974 Agreement "we had about a two to one and a half percent minority ... we had a total of five ... [The total number of craft employees was] somewhere around 290, at that time." A. 62. We have selected the precise figure on the statistical exhibit rather than the approximation of Mr. English for the purposes of the statistical calculations. However, the result would be approximately the same with either set of numbers.

A. 60.[31/] It is apparent that the selection process, including the use of the prior indus-

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31/ The actual census data were not introduced by the parties in this case. The 1970 census figures for St. James and St. John the Baptist Parishes show that the black proportion of the "blue collar" work force was actually 40.6%, not 39%. The census shows the following racial breakdowns for the workforce, U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, Characteristics of the Population, Part 20, Louisiana, Table 122 (hereinafter "Census"):

	St. James			St. John the Baptist		
	TOTAL	BLACK	% BLACK	TOTAL	BLACK	% BLACK
Total Employees	4,976	2,014	40.5	6,321	2,312	36.6
Crafts	383	179	22.9	1,246	253	20.3
Operatives	1,290	517	40.1	1,425	612	42.9
Laborers	456	343	75.2	665	479	72.0
Blue Collar	2,529	1,039	41.1	3,336	1,344	40.3

trial experience requirement, had a substantial adverse impact on black workers. While blacks

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31/ Cont'd

St. James & St. John the Baptist Combined

	TOTAL	BLACK	% BLACK
Total Employees	11,297	4,326	38.3
Crafts	2,029	432	21.3
Operatives	2,715	1,129	41.6
Laborers	1,121	822	73.3
Blue Collar	5,865	2,383	40.6

These figures include all the employed persons in these occupational categories. (The blue collar category is the sum of the totals in the craft, operative and laborer categories). There are no published census data by parish for the "experienced" workforce which would include unemployed as well as employed persons; nor are there published data by parish which divide the craft category into sub-categories, e.g., electricians, carpenters, as there are for states and Standard Metropolitan Statistical Areas, see nn. 36-38, infra.

were 39% of the labor force, they were only 2% of the craftsmen employed at Kaiser. Thomas Bouble, who for eight years had been Kaiser's Director of Equal Opportunity Affairs and who had been employed by Kaiser for nineteen years, stated that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry in the United States, and in every area of the United States." A. 90. Moreover, blacks "until just recently ... did not get into [the] building trade [training] programs" which provided a substantial portion of the training opportunity for craft positions. A. 63 (English), A. 104 (Bouble); see also pp. 89-104, infra.

Since this prior experience requirement had an adverse racial impact, the burden in litigation would fall on Kaiser to establish the "business necessity" or manifest job relationship of the requirement. See p. 64, supra. There is no evidence concerning the business necessity of this requirement. Nor is it likely that Kaiser could show any manifest job relationship for this apparently arbitrary requirement: the requirement was changed from five years to three years

without any apparent harm;[32] the requirement for prior industrial as opposed to other relevant experience -- e.g., in the armed forces, as a private contractor, etc. -- seems unjustifiable; and the application of the same requirement across-the-board to craft positions which varied greatly[33] does not appear to be validly related to the job requirements of each position. Thus, the evidence indicates that under the adverse impact principle of Griggs and Albemarle Paper, Kaiser had reason to believe that it had violated Title VII.[34]

Moreover, the Company had reason to believe that its craft selection practices also constituted a violation of Title VII under the disparate

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32/ The record does not indicate when the requirement was changed.

33/ At the Grammercy plant, Kaiser employed craftsmen in the following occupations: General Repairman, Air Conditioner Repairman, Insulator, Carpenter-Painter, Garage Mechanic, Machinist, Electrician, Instrument and Electrical Repairman. A. 167 (K. Ex. 3).

34/ The district court stated that the low proportion of blacks in the plant's craft population

treatment principle set forth in Teamsters and Hazelwood School District. See pp. 64-65, supra. While Company officials testified that trained blacks were "unavailable" despite Kaiser's active recruiting efforts, A. 62-63 (English), A. 90, 93 (Bouble), they did not refer to any census data in support of their assertion. In fact, the census

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34/ Cont'd

"might suggest that Kaiser had discriminated against blacks when filling craft positions." G. Pet. 65a. The court then concluded that this showing of discrimination was rebutted by the mere fact that Mr. English, the Industrial Relations Superintendent, had testified that Kaiser had vigorously sought black craftsmen. Id. Even if Mr. English's protestation of good faith recruitment is accepted -- and there is considerable doubt concerning the recruitment efforts, see pp. 77-78 infra -- this conclusion is contrary to applicable law. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," Griggs v. Duke Power, supra, 401 U.S. at 432. The district court's failure to consider the "consequences" of the prior experience requirement was plain error. In fact, in a case involving another Kaiser plant the Fifth Circuit reversed a district court's finding of no discrimination on almost identical facts, Parson v. Kaiser Aluminum, supra, 575 F.2d at 1389-90.

data show[35] that the proportion of blacks working in crafts at Kaiser (approximately 2%) was disproportionately low when compared to the available proportion of trained blacks listed in the "craftsmen and kindred workers" category in the workforce for the parishes of St. James and St. John the Baptist (21.3%), see p. 67 n.31, supra, for the state of Louisiana (16.0%)[36] or for the

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35/ This Court has taken judicial notice of census data when determining whether there is a prima facie case of employment discrimination. See Griggs v. Duke Power, supra, 401 U.S. at 430 n.6; cf. Dothard v. Rawlinson, supra, 433 U.S. at 329-30; see also Watkins v. Scott Paper Co., 530 F.2d 1159, 1185 n.36 (5th Cir.), cert. denied, 429 U.S. 861 (1976).

36/ Louisiana:	Total	White	Black	Percent Black
Total experienced labor force	1,217,334	903,556	311,110	25.6
Craftsmen and kindred workers	177,770	149,039	28,464	16.0
Carpenters	18,193	14,273	3,884	21.3

Standard Metropolitan Statistical Areas of the cities of New Orleans (18.7%)[37] and Baton Rouge

36/ Cont'd	Total	White	Black	Percent Black
Mechanics & Repairmen	37,627	32,096	5,493	14.6
Electricians	7,967	7,713	242	3.0

Census, Table 172.

37/ New Orleans:

Total experienced labor force	386,072	281,715	103,234	26.7
Craftsmen and kindred workers	52,433	42,522	9,792	18.7
Carpenters	4,366	3,196	1,165	16.7
Mechanics & Repairmen	11,029	9,430	1,589	14.4
Electricians	2,713	2,590	118	4.3

Census, Table 172.

(17.8%).[38/]

When the statistical analysis adopted by this Court in Castaneda v. Partida, 430 U.S. 482 (1977), and Hazelwood School District, supra, is

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38/ Baton Rouge:

	Total	White	Black	Percent Black
Total experienced labor force	106,600	78,780	27,663	30.0
Craftsmen and kindred workers	16,639	13,674	2,960	17.8
Carpenters	1,292	850	442	34.2
Mechanics & Repairmen	3,085	2,596	489	15.9
Electricians	800	781	19	2.4

Census, Table 172.

applied to the disparity between the proportion of blacks in the craft positions in the plant and the proportion of blacks in the workforce of the parishes, of the State of Louisiana, or of the Baton Rouge or New Orleans SMSA,[39/] the results indicate a prima facie case of intentional discrimination. This analysis shows that there is a difference of 7.8 standard deviations between the actual number of blacks hired as craftsmen by Kaiser and the number one would expect as a result of nondiscriminatory hiring from a labor market consisting of the parishes of St. James and St. John the Baptist[40/] and a difference of 6.4

39/ These workforces have been chosen in addition to the workforce of St. James and St. John's parishes because Kaiser's officials stated that they actively recruited craftsmen throughout the area and specifically in Baton Rouge and New Orleans. A. 62. Moreover, the published census data for the parishes do not divide the "craftsmen" category into sub-categories of "carpenters," "mechanics and repairmen" and "electricians."

40/ This statistical model measures fluctuations from the expected value in terms of the standard

standard deviations if the labor market includes the entire state of Louisiana. A fluctuation of more than two or three standard deviations "undercut[s] the hypothesis that decisions were being made randomly with respect to race," Hazelwood School District, supra, 433 U.S. at 311 n.17. In fact, even if the black proportion of the avail-

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40/ Cont'd

deviation, which is defined as the square root of the product of the total number in the sample (here, 273) times the probability of selecting a black (.213) times the probability of selecting a non-black (.787). The standard deviation based on the workforce of the two parishes is 6.8. The difference between the expected (.213 x 273 = 58) and observed number of blacks hired during this period is 53, which is 7.8 standard deviations ([58-5] divided by 6.8 = 7.8). Castaneda v. Partida, supra, 430 U.S. at 496-97. The likelihood that a comparable craft workforce would occur by chance is less than 1 in 10^{21}. On average, in only one of more than one hundred million trillion randomly selected groups each containing 273 craftsmen recruited from this workforce would there be a group containing five or fewer blacks. This statistic was derived from the binomial probability distribution. See Mosteller, Rourke, Thomas, Probability with Statistical Applications, 130-146 (1970); Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338, 353-357 (1966).

able pool of skilled workers had been 8% -- i.e., half of that which the census data indicate for Louisiana -- there would have been a difference of 3.7 standard deviations between the actual number and the expected number of black craftsmen at the Grammercy plant.

Although the availability of trained black craftsmen was much greater than Kaiser's superintendent asserted, it was, as he also indicated, much less than would be expected absent discrimination in employment and training programs in the area. The superintendent's mere statement that Kaiser engaged in an active minority recruitment program -- a statement which was required in order to avoid a direct admission of discriminatory practices -- does not rebut the prima facie case.41/ The statistical disparities indicate

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41/ Kaiser did not present specific evidence concerning the scope, duration or application of its recruitment efforts. In fact, the Office of Federal Contract Compliance, in a 1971 letter to the Grammercy plant manager, indicated that "Kaiser had not been effective in utilizing minority recruitment sources" and that "affirma-

that, whatever the intention of Kaiser's top management, the selection practices for craftsmen were applied in a racially disparate manner at the Grammercy plant.[42/]

41/ Cont'd

tive action as required by the OFCC regulations has not been taken to identify and attract minority applicants..." The 1971 findings by the OFCC were lodged by the United States with the Clerk of the Court, see G. Pet., p. 18 n.6.

42/ There was no evidence placed in the record concerning who administered the selection system, or what controls, if any, existed to insure that the system was being applied fairly and without discrimination. However, a 1973 OFCC "review of persons transferring into the maintenance crafts (all Caucasians) revealed that several Caucasians did not possess the required prior experience for such transfers...." The OFCC Memorandum dated January 31, 1973, was lodged by the United States with the Clerk of the Court, see G. Pet., p. 18 n.7.

At the Company's plant in Chalmette, Louisiana, where black workers had brought a lawsuit alleging unlawful discrimination, there was also a prior experience requirement for entry into craft positions. The Fifth Circuit observed that "[t]here is some evidence in the record that this requirement is not consistently applied and that decisions to waive or modify it are within the

b. Craft Training Programs. During the period from 1964 through 1971, the Company at various times operated on-the-job training programs for the positions of general repairman and carpenter-painter. A. 136 (Stipulation pp. 2-3). An employee was required to have three years of prior experience in the applicable job "category" in order to enter the training program for general repairman[43/] and one year of prior experience to enter the program for carpenter-painter. During the operation of these programs, seventeen trainees were enrolled in the general repairman program and eleven trainees were enrolled in the carpenter-painter program. Only two of the twenty-eight trainees, both in the carpenter-painter program, were black. Id.

42/ Cont'd

discretion of the supervisor involved in the hiring practice," Parson v. Kaiser Aluminum, supra, 575 F.2d at 1381.

43/ Although the prior experience requirement was modified in 1971 to permit employees with two years of prior experience to enter the program, there was only one trainee in 1971. A. 126 (Stipulation p. 2).

This low proportion of blacks in the training programs (7%) compared to the proportion of blacks in the workforce (39%) demonstrates the adverse impact of the Company's selection practice. See Griggs v. Duke Power Co., supra, 401 U.S. at 430 n.6; Dothard v. Rawlinson, supra, 433 U.S. at 329. The prior experience requirement was a ready mechanism for discriminatory exclusion of blacks from the craft training programs as well as from direct entry into the craft positions. See pp. 67-70, supra. While there was some evidence concerning the cost of the training programs and an indication that this cost would be reduced by selecting persons with prior experience, these statements do not establish a "business necessity" for the use of this discriminatory requirement. G. Pet. 36a (Wisdom, J., dissenting).44/

44/ The district court ignored the discriminatory training program. The appellate court majority attempted to dismiss this proof of prior discrimination by concluding "that this program was so limited in scope that the prior craft experience cannot be characterized as an unlawful employment practice," G. Pet. 17a n.13. Title VII does not countenance a discriminatory practice because it "only" has an impact on a few individuals: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for

c. General Hiring Practices. Kaiser also had a reasonable basis for believing that it had engaged in prior discriminatory practices in its general hiring procedures. G. Pet. 35a (Wisdom, J., dissenting):

> The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10

44/ Cont'd

each applicant regardless of race . . . ." Furnco Construction Corp. v. Waters, 57 L. Ed.2d 957, 969 (1978); see also G. Pet. 37a (Wisdom, J., dissenting); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972) ("The degree of discrimination . . . is unimportant under Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act").

In fact, Kaiser's affirmative action plan had not even remedied the "small" discrimination in the training program. If Kaiser's program had operated in a racially neutral manner, then one would expect that approximately ten of the trainees (the black proportion of the workforce, 39%, multiplied by the number of positions, 28) would have been black. Since only two blacks were trained, the approximate number of blacks who were discriminatorily denied this training opportunity was eight. Through trial, only seven blacks had been selected for the training program under the affirmative action plan.

> percent in 1969. The testimony that Kaiser had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through nonvalidated tests, or impermissibly subjective processes. The statistics here constituted a prima facie case of discrimination. (Footnote omitted.)

The increase in the black proportion of employees at the plant resulted from the adoption by Kaiser in 1969 of a plan for hiring one black for each white hired until the black proportion of the plant workforce was comparable to the black proportion of the outside workforce. A. 82, 87 (English). This plan was adopted by Kaiser upon the recommendation of OFCC personnel who found after a review of the plant that Kaiser "had a relatively low percentage of minorities in the workforce." A. 82. While the affirmative action plan for hiring removed the adverse impact or disparate treatment from Kaiser's post-1969 initial selection procedures, the severe disparity between the proportion of blacks in the plant, 10-11%, 45/ and the proportion of blacks in the

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45/ The parties stipulated that in 1969 minorities constituted "10 or 11 percent" of the plant workforce. A. 49.

outside workforce, 39%, constituted a prima facie case of pre-1969 hiring discrimination. Griggs v. Duke Power Co., supra, 401 U.S. at 430 n.6; Dothard v. Rawlinson, supra, 433 U.S. at 329. Discrimination in hiring is directly related to discrimination in the selection for craft training not only, as Judge Wisdom stated, G. Pet. 35a, "because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority," but also because the institution of a new training program in which selection was based upon date of hire seniority would perpetuate the discrimination in hiring and might well constitute a new violation of the fair employment laws.

2. Modification of Kaiser's Present Practices. In addition to remedying prior discriminatory practices, an employer has an affirmative obligation to insure that its present practices do not constitute on-going discrimination. An employer does not satisfy this obligation by merely determining that its practices were developed and implemented without racial animus, but

must also consider the racial effects of those practices. Kaiser was required not only to cease its reliance on "prior industrial experience" in selecting and training craftsmen, see pp. 65-70, supra, but also to insure that its new practices were free from discriminatory effect. Kaiser faced a difficult challenge in designing a workable system. The difficulty was created by the longstanding discriminatory practices of employers in the industry (including Kaiser), of public educational institutions, and of unions which all contributed to blacks being severely underrepresented in the craft labor force, see pp. 88-103, infra. If Kaiser had continued to rely solely upon affirmative recruitment to attract a representative proportion of black craftsmen, it would have "end[ed] up baying at the moon, as it were." A. 93 (Bouble).[46/] The development of a program to train inexperienced employees or new hires was

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46/ While Kaiser officials underestimated the availability of black craftsmen, it is clear that they were correct in their general conclusion that discrimination in employment and education had restricted training opportunities and that blacks were underrepresented in the skilled workforce.

the only realistic way for Kaiser to select craftsmen in a manner which would not have an adverse racial effect. A. 64-66 (English).

In order for Kaiser to lawfully hire skilled craftsmen from a labor force which was disproportionately composed of white workers, it would have had to develop valid, job-related measures for evaluating relevant experience or skill.[47/] But even if Kaiser could demonstrate that the experience requirement was job-related, the requirement would still be unlawful if there were a selection system which had a less discriminatory effect and which would also have "serve[d] . . . [its] legitimate interest in 'efficient and trustworthy workmanship'." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425. Here an alternative system was available: a training program. While Kaiser may have been able to develop and

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47/ When an employer uses the prior "experience" of applicants as a selection criterion the employer must show, if the criterion has an adverse racial impact, that it is a valid selection procedure. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§1607.3, 1607.16Q.

support a lawful experience requirement, the decision to remove the discriminatory effect from its selection procedure by instituting a training program was a proper method of complying with Title VII.[48/]

Employers must be given the clear option of removing the adverse effect of selection practices rather than being required to engage in potentially expensive and possibly ineffective efforts to validate selection criteria. Otherwise, the national goal of assuring equal employment opportunity will not be realized in the foreseeable future. Kaiser's decision to adopt a program

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48/ See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.6. In order to remove the adverse impact from its selection practices, Kaiser would be required to select blacks for approximately 39% of its trainee positions, the black proportion of the area workforce. Thus, at least for the Grammercy plant, Kaiser's affirmative action plan -- which included a ratio of one black for each white hired -- operated primarily to remove the adverse effect of nonvalidated selection practices rather than to remedy prior discriminatory practices.

to train inexperienced black and white workers rather than to concentrate its resources on an attempt to justify pre-existing practices for selecting "experienced" workers -- which clearly would have resulted in few blacks being hired -- is precisely the type of responsible business decision that is required for the effective implementation of Title VII.

Moreover, if Kaiser had continued to hire "experienced" craftsmen despite its knowledge[49/]

49/ Kaiser officials acknowledged that discrimination in training programs limited the supply of black craftsmen, and that this was one of the basic reasons for the institution of the affirmative action plan. Furthermore, the OFCC brought this matter directly to the attention of the plant manager. After noting that in 1971 there was not a single black craftsman at the plant, the OFCC stated that "[m]aintenance craft training programs are needed; the qualification and potential of minorities presently employed at Kaiser should be reviewed and those determined to be eligible should be given high priority for such training, any direct hiring into these classifications should include at least the minority ratio that exists in the company's recruitment area." Letter dated January 25, 1971, to Mr. Melancan, plant manager, from Guy W. McCarty, Chief Contract Compliance Officer, see p.78 n.42, supra.

that the availability of experienced black workers was severely limited because of discrimination in admission to industry and union training programs, it would have been potentially liable for intentional discrimination. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-68 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976);[50] see pp. 64-65, supra. Kaiser could not avoid liability by assigning the discriminatory animus to the unions or to the other companies which operated craft training programs. If Kaiser, rather than instituting an affirmative action training program, had continued to select "experienced" craftsmen by relying on the discriminatory training programs in its recruitment area, and if this process had resulted, as could be expected, in the selection of a low proportion of black workers, Kaiser's

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50/ "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." Washington v. Davis, supra, 426 U.S. at 253 (Stevens, J., concurring).

practices would constitute a prima facie showing of an intentional violation of the fair employment laws.[51]

3. General Discrimination in the Training and Development of Craft Workers. Kaiser's prior selection practices -- including its selection of craft workers from the pool of qualified craftsmen who had "prior industrial experience" and who frequently were trained in programs operated by the construction trade unions -- must be examined in light of the longstanding practices of deliberate discrimination in the crafts.[52] These practices contributed directly to the present problems of the disproportionately high rate of black unemployment and the limited availability of black craftsmen. Given the effects of decades of discrimination, it was difficult if not impossible

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51/ See e.g., Commonwealth of Pennsylvania v. Local 542, Operating Engineers, Civil Action No. 71-2698 (E.D. Pa., Nov. 30, 1978), Slip Opinion at 122-43 (Higginbotham, J.).

52/ Kaiser officials did, in fact, examine their practices in this light. See n.26 and p. 69, supra.

for Kaiser to adopt racially neutral selection procedures for craft positions which did not severely limit the employment opportunities of black workers. Facially neutral employment practices often have an adverse racial effect because discrimination by educational institutions and by other employers and unions has limited the skills and experience which black workers have been permitted to acquire. In many circumstances it is unlawful for employers to ignore the effects of such practices, see pp. 69-71, supra, and in all circumstances it is a national policy of the highest priority to encourage voluntary action to remedy those effects, see pp. 38-40, supra.

For a hundred years prior to the passage of the Civil Rights Act of 1964 the workplace for blacks was marked by deliberate practices designed to restrict them to specific positions in the job market and to eliminate them altogether from the skilled trades.[53/] By the end of the Civil War blacks constituted the great majority, approxi-

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53/ The history of this period is by necessity summarized in this brief. A full historical

mately 80%, of all skilled tradesmen in the South.[54/] The predominance of blacks in the skilled trades directly resulted from the fact

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53/ Cont'd

discussion of blacks and the workplace may be found in Spero and Harris, The Black Worker (Atheneum ed., 1968) (hereinafter "Spero and Harris"); and a brief but thorough discussion may be found in Myrdal, An American Dilemma (Harper & Row ed., 1962) at 1079-1124 (hereinafter "Myrdal"). A thorough discussion of black workers during the period from World War I through World War II is found in Weaver, Negro Labor, A National Problem (1946) (hereinafter "Weaver"), and of blacks in labor unions in Marshall, The Negro and Organized Labor (1965) (hereinafter "Marshall"); Marshall and Briggs, The Negro and Apprenticeship (1967) (hereinafter "Marshall and Briggs"); and Northrup, Organized Labor and the Negro (1944) (hereinafter "Northrup"). For more recent discussions, see Hill, Black Labor and The American Legal System: Race, Work and the Law (1977), and Gould, Black Workers in White Unions (1977).

54/ Spero and Harris, p. 16; Myrdal, p. 1101.

that slaves with skills had a greater market value and could produce additional income.[55] The post-Civil War period saw the development of extensive efforts to limit or eliminate the opportunity for black workers to use their skills or to acquire new ones.[56]

After the Civil War blacks were excluded by law or practice from practically all apprentice programs.[57] Moreover, blacks were assigned to

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55/ Spero and Harris, pp. 5-6; Myrdal, pp. 887, 1100-1101.

56/ There had been attempts prior to the Civil War to limit the opportunities of blacks to work as craftsmen. For example, the Georgia Legislature passed a law in 1845 making it a criminal offense for a "white person ... [to] contract or bargain with any slave, mechanic or mason, or free person of color, being a mechanic or mason ...," quoted in Spero and Harris, p. 8. However, these efforts were generally unsuccessful because of the political and economic power of the slave owners, id., pp. 7-9. Myrdal, p. 1101.

57/ The enactment of the Black Codes regulated the conditions of freedmen's labor and subjected them to the control of their former masters or other white men. Myrdal, p. 228. For example,

vocational schools which "seldom fitted them for the current demands of the so-called 'Southern Industrial Revolution'."[58] Accordingly, blacks were effectively precluded from entrance into formal training programs.

Blacks continued to be assigned to segregated and inferior vocational education schools until well after Brown v. Board of Education, 347 U.S.

57/ Cont'd

in December of 1865, the South Carolina Legislature passed an Act providing "that no person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment, or business, (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person ... until he shall have obtained a license therefor from the judge of the district court...." McPherson, The Political History of the United States of America During the Period of Reconstruction (Reprinted 1969), p. 36. These codes were abolished during Reconstruction but they later reappeared in various forms. Myrdal, p. 228.

58/ Hall, Black Vocational, Technical and Industrial Arts Education (American Technical Society 1973), p. 19; Weaver, p. 41.

438 (1954). The "usual practice in the South, ... has been to have segregated vocational schools where Negroes are trained only for occupations they have traditionally held."[59/] "The Negro industrial high schools in the South ... had little or no equipment, and their graduates were seldom prepared to earn a living in a skilled trade."[60/] It was the practice for these vocational high schools "to provide training in those occupations that Negroes could get employment in, in [the] community."[61/] This standard, which perpetuated existing patterns of employment discrimination, was approved by HEW as late as 1961.[62/] For example, as of 1961 in the New Orleans area there were four vocational education high schools. In the one school which admitted blacks to its training programs, the apprentice courses available were for carpenters, cement masons, plasterers and lathers: "The program is limited to these trades as they

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59/ Marshall, p. 135.

60/ Weaver, p. 41.

61/ United States Commission on Civil Rights, Employment (1961), p. 97.

62/ Id.

are the ones to which Negroes have access".[63/] The trade schools which were exclusively for white students offered apprentice courses for boilermakers, carpenters, millmen, electrical workers, glaziers, iron workers, painters, plumbers, steamfitters, sheet metal workers, machinists and operating engineers.[64/] In Louisiana in 1961 there were twenty-seven vocational education schools, twenty-three reserved exclusively for whites and four exclusively for blacks.[65/] The pattern remained in effect into the 1970s.[66/]

Moreover, as unions, especially in the crafts, increased their control and influence in

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63/ State Advisory Committee, United States Commission on Civil Rights, 50 States Report (1961), p. 209.

64/ Id.

65/ Id.

66/ The statistics provided by HEW for "students and faculty in Louisiana's vocational schools ... show seven schools as overwhelmingly black and 25 schools as overwhelmingly white. Many of the schools operated by State departments of education are obviously segregated." Adams v. Richardson, 351 F.Supp. 636, 639 (D.D.C. 1972).

the labor market during the period after 1900, the access of black workers to training programs and skilled positions became even more limited.[67] Many of the A.F.L. unions excluded blacks by express constitutional provision or by ritual requirements.[68] Other unions denied admission to blacks or restricted their access to jobs by a series of "unwritten" practices.[69] It is important to note that all of the crafts "are not equally bad."[70] In the older crafts such as the

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67/ Myrdal, p. 1102.

68/ Karson and Radosh, "The American Federation of Labor and the Negro Worker, 1894-1949," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968), pp. 157-58. These unions included several, like the Machinists, the Boilermakers, and the Iron and Shipbuilders, which operated apprentice programs.

69/ Id., p. 158; Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968), p. 145 ("Unions in the newer occupations like the plumbing and electrical trades have been able to bar Negroes from their unions and from better jobs in the industry through their control of apprenticeship training and their influence with some licensing boards."). See Northrup, pp. 23-37.

70/ Myrdal, p. 1102.

carpenter, painter and trowel trades, where black workers had traditionally been established, they were able to maintain, although on a diminishing basis, access to training and jobs.[71] But black workers never had a chance to enter the newer occupational categories, or those which increased greatly during the industrialization of the South, e.g., plumber, electrician, machinist. The craft unions that controlled or influenced employment in these occupations severely restricted or totally excluded black entry, see nn.67-70, supra; as a result, blacks were unable to obtain a share of the increased employment opportunities in the twentieth century, see pp. 100-102, infra. The persistence into the 1970s of these discriminatory practices is confirmed by the extraordinary number of judicial findings of Title VII violations by craft unions.[72]

71/ Id., pp. 1101-1102; Northrup, pp. 26-41.

72/ "Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice." G. Pet. 46a n.18 (Wisdom, J., dissenting). See United States

Finally, traditional patterns of discrimination and segregation by management contributed to the exclusion of blacks from craft positions and industrial training programs.

> Employers traditionally have felt that Negroes were 'suited' mainly for hot, dirty, or otherwise disagreeable jobs. Historically, management has been willing to hire Negroes for white jobs only where they would work for lower wages than whites or would act as strikebreakers or otherwise help prevent unionization.73/

72/ Cont'd

Commission on Civil Rights, The Challenge Ahead (1976), pp. 58-94 (summarizing judicial findings of discrimination by craft unions).

73/ Marshall and Briggs, p. 34. "Virtually all these 'Negro job' industries have the common feature that they are regarded as undesirable from one or several viewpoints. Many of them carry a social stigma, particularly in the South, where they tend to be despised not only because they are located at the bottom of the occupational ladder, but also because of the very fact that they are traditionally 'Negro jobs.'" Myrdal, p. 1080.

While in the last fifteen years there have been changes in these traditional attitudes, various practices have served to perpetuate the prior systems of segregation.74/ The racial allocation of jobs, and especially the limitation on the opportunity of black workers to move into craft positions in industrial plants, have persisted.75/

73/ Cont'd

"Outside capital which promoted the South's industrialization adhered closely to the color-caste system of the region. The occupational patterns which evolved were in accord with this basic principle: clean, light, well-paid jobs for whites and heavy, dirty, lower paid jobs for Negro." Weaver, p. 6; see pp. 7-8.

74/ "The influence of industrial unions has been mainly to perpetuate job segregation by formalizing separate seniority lines and resisting changes which would make it possible for Negroes to be transferred and promoted on the basis of seniority." Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobsen 1968), p. 143.

75/ See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 340-45 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Pettway v.

As a result of these deliberate practices of discrimination, the proportion of blacks employed as skilled craftsmen decreased substantially from 1865 through 1940.[76] Moreover, a pattern developed which remains a serious problem: during times of economic slowdown, black workers lose what little gains they may have made and their unemployment rate increases much faster than that of white workers.[77] While black workers experienced significant employment gains during the war years, 1942-1944, almost half of the black workers who were employed in war industries, a much greater proportion than for white workers, were employed in areas of acute labor shortage. Accordingly, black workers were far more likely than white workers to be laid off after the war.[78] Furthermore, "[i]n the South, the occupational color-caste system was so firmly entrenched that even in the majority of tight labor markets [during the War], there were but slight relaxations" in the barriers to black employment.[79]

75/ Cont'd

American Cast Iron Pipe Co., 494 F.2d 211, 236-39 (5th Cir. 1974); Robinson v. Union Carbide Corp., 538 F.2d 652, 661 (5th Cir. 1976); Stevenson v. International Paper Co., 516 F.2d 103, 116 (5th Cir. 1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2d Cir. 1971).

76/ For the period 1865 through 1890, see Myrdal, p. 1101. For the period from 1890-1940, see Northrup, pp. 18-19:

	1890 % Black	1910 % Black	1940 % Black
Carpenters	25.6	23.2	13.7
Painters	22.2	25.3	14.5
Bricklayers	47.0	54.7	31.5
Plasterers and Cement Finishers	52.5	66.5	54.5
Plumbers	not available	15.5	11.1
Electricians	not available	2.9	1.5
Total	not available	26.3	15.2

77/ See Weaver, pp. 8-15 for a discussion of the effects of the Depression on black workers. "Almost a half of the skilled Negro males in the nation were displaced from their usual types of employment during the period 1930 to 1936; a third of those outside their usual occupations were in unskilled work, and over 17 percent were unemployed." Id., p. 9.

78/ Weaver, pp. 86-87 and 78-93.

79/ Id., p. 92.

From 1950 through 1965 the position of black workers continued to deteriorate relative to that of white workers. "Declining employment opportunities in jobs traditionally open to them, together with population shifts which increased the number of young Negro males, caused these groups to experience declining relative labor force participation rates, rising unemployment rates, and declining relative incomes during these years."[80/] In 1965, after reviewing these figures and the projection that the non-white labor force was expected to rise at a substantially greater rate than the white labor force, then Professor Marshall emphasized "the urgency of the need to

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80/ Marshall and Briggs, p.3. For example, "[a]fter having been consistently less than double the white rates before 1957, non-white unemployment rates were consistently more than double those of whites after 1957. In 1948, teen-age male unemployment rates were 7.6 percent for non-whites and 8.3 percent for whites; in 1965, these relative positions were reversed and the teen-age male unemployment rates were 22.6 percent for non-whites and 11.8 percent for whites." Id., p.3 n.2 (emphasis in original).

get more Negroes into the skilled trades."[81/] Unfortunately, while the enactment and enforcement of Title VII, the enforcement of the Executive Order, and the adoption of voluntary affirmative action have had some positive effect,[82/] the continued discriminatory practices and the operation of many businesses and unions according to traditional patterns have prevented the necessary significant increase of black workers in the skilled trades.[83/] The urgency remains; responsible affirmative action by companies like Kaiser and unions like the Steelworkers must

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81/ Id., p. 4.

82/ See generally, United States Commission on Civil Rights, The Challenge Ahead (1976).

83/ See p. 99 nn. 74-75, supra. See also The Challenge Ahead, supra, 26-31. "In summary, the effect of intentional and direct employment discrimination in the building trades continue [sic] to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunity of minorities and women is unfortunately quite small." Id. at 94 (footnote omitted).

be firmly supported if the longstanding practices of deliberate employment discrimination and their effects are to be finally terminated.

4. Compliance with the Executive Order. As a substantial government contractor, Kaiser was and is obligated to comply with the requirements of Executive Order No. 11,246. These requirements include the adoption of goals and timetables for minority participation where there is an "under-utilization" of minorities in the contractor's workforce. 41 C.F.R. §60-2 (Revised Order No.4). OFCC officials warned Kaiser in 1971 that its plan for compliance with the Executive Order contained "deficiencies" and that Kaiser should provide specific plans for correcting these deficiencies.[84/] One OFCC recommendation to Kaiser -- which was very similar to the plan adopted -- was that the Company establish a craft training program; selection for the program "should include at least the minority ratio that exists in the

84/ Letter dated January 25, 1971, to Mr. Melancan, plant manager, from Guy W. McCarty, Chief Contract Compliance Officer, see pp. 77-78 n.41, supra.

company's recruitment area"; and "the figure of 50 percent would be used as the minority population ratio in the area from which Kaiser draws its workforce...."[85/] In compliance review sessions, OFCC personnel repeatedly criticized Kaiser's craft selection practices and suggested that alternatives be adopted.[86/]

Kaiser acted consistently with the provisions of the Executive Order and Revised Order and with the recommendations of OFCC personnel when it adopted race-conscious provisions for its affirmative action plan. Cf. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). This independent justification for the plan is only briefly discussed because the United States has intervened in this lawsuit in part to support enforcement

85/ Id.

86/ The Director of Equal Employment Affairs for Kaiser testified that, "... I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing." A. 93.

efforts under the Executive Order. However, it is important to emphasize that the race-conscious procedures of Revised Order 4 for enforcing the Executive Order were only added after twenty-seven years of enforcement experience demonstrated the ineffectiveness of alternative approaches.87/

87/ The Committee on Government Contract Compliance established by President Truman reported in 1953 that under the initial Executive Orders, the non-discrimination clauses had become "almost forgotten, dead and buried under thousands of words ...." Sovern, Legal Restraints on Racial Discrimination in Employment, Appendix G at 254 (1966) (partial reprint). Changes made in the Executive Order program during the 1950s did not improve compliance because of "[t]he indifference of employers to establishing a positive policy of non-discrimination ...." Committee on Government Contracts, Pattern for Progress: Final Report to President Eisenhower, p. 14 (1960) (emphasis in original). As a result of this finding, Executive Order No. 10,925, 3 C.F.R. 443 (1959-63 Comp.), included a provision that "[t]he Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin." The refinement of the concept of affirmative action into a more effective tool for insuring equal employment opportunity and for

B. The Plan Was Properly Designed

1. The Plan

In 1974 Kaiser and other major aluminum companies entered into an industry-wide "master" agreement with the Steelworkers. The agreement provided, inter alia, that (a) a joint company-union implementation committee would review all existing craft classifications "with respect to their representation of minority and female employees"; (b) in filling craft and assigned maintenance jobs including training or apprentice positions, "not less than one minority or female employee will enter for every non-minority employee entering, including, if necessary, off the street hires, until the goal is reached unless at a particular time there are insufficient available

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87/ Cont'd

providing remedies for discriminatory practices led to the adoption of the present race-conscious enforcement provisions. See, e.g., Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 12-14 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra, 442 F.2d at 170-71. See Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341.

qualified minority and/or female candidates"; (c) a minority goal was to be established at each plant according to the availability of minorities in the relevant workforce; the goal for women was set at 5%. A. 145 (Joint Ex. 2).[88] For the Grammercy plant a minority goal of thirty-nine percent was established for each craft family. G. Pet. 63a (opinion of the district court).[89]

88/ These goals represented "the parties' best estimates of the initial goals to be achieved, recognizing that these goals may change as future court/Government decisions are rendered." Id.

It should be noted that the goals were established for each of six "craft families." A. 145 (Joint Ex. 2). Thus, if the goal for minority representatives was attained for the "carpenter craft family," the entry ratio for those craft jobs would cease, but the entry ratio for the "electrician craft family" would continue until the goal for minority representation in that craft family had been attained. Id. This was a sensible arrangement; while there had been discrimination against minorities with respect to entry into all crafts, the discrimination was more severe in some crafts, e.g., electrician, than in others, e.g., carpenters, see pp. 96-97, supra.

89/ In the application of the master agreement to the Grammercy plant there was provision only for

This lawsuit resulted from the application of this plan to the Grammercy plant during 1974. Thirteen trainees for the apprentice positions were selected under the affirmative action plan -- seven black workers and six white workers.[90] The

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89/ Cont'd

the selection of one minority for each non-minority for craft jobs. G. Pet. 62a (op. district court). There is no explanation in the record why women were not included. A Kaiser official testified that women, like minorities, had "certainly" been denied training opportunities. A. 90 (Bouble).

90/ In April 1974, there were nine training openings which were posted for bid, in May one opening, and in October three openings. The chart below summarizes the training programs available and the race of the trainees selected. A. 166 (K. Ex. 2); G. Pet 63a (op. district court).

	Number of Blacks	Number of Whites	Total
April			
Instr. Repairman	1	1	2
Electrician	1	1	2
General Repairman	3	2	5

Company followed the affirmative action plan in filling the training vacancies on an alternating basis: the first training vacancy was awarded to the black worker who had the greatest amount of plant seniority among the black workers who had submitted bids for the job; the second vacancy was similarly awarded to the white worker who had the greatest amount of plant seniority among the white workers who had submitted bids for the job. A. 72-75 (English). In each of the seven instances where black workers were selected for the apprentice positions, at least one white worker was passed over who had greater plant seniority than the black worker who was selected. G. Pet. 63a-64a (opinion of the district court).

90/ Cont'd

	Number of Blacks	Number of Whites	Total
May			
Air Conditioner Repairman		1	1
October			
Carpenter	1	1	2
Insulator	1	—	1
Total	7	6	13

It is important to note that during 1974, Kaiser hired twenty-two experienced craftsmen in addition to its selection of thirteen apprentices. A. 65. Only one of these twenty-two crafts men was black. Id. There was no explanation as to why Kaiser selected twenty-seven white workers as craftsmen or apprentices and only eight black workers as craftsmen or apprentices despite the fact that it had a contractual obligation to fill "apprentice and craft jobs ... at a minimum [with] not less than one minority employee ... for every non-minority employee ...."91/ G. Pet. 62a (opinion of the district court). During 1974

91/ Since the agreement went into effect on February 1, 1974, G. Pet. 62a, it is highly unlikely that all twenty-two of the craftsmen hired during 1974 were selected prior to the institution of the plan. The only possible explanation for the disparity, apart from Kaiser's having violated the agreement, was that "qualified" minority candidates were unavailable, and that Kaiser had an immediate requirement for additional craftsmen. However, if Kaiser was using the "prior industrial experience" requirement to determine which craftsmen were qualified and if Kaiser was using the same selection practices in 1974 that it had used prior to 1974, then there is reason to believe that Kaiser was violating not only the agreement but also Title VII, see pp. 65-78, supra.

there was a marked disparity, even with the affirmative action plan, between the proportion of blacks selected for craft and apprentice positions, 23%, and the proportion of blacks in the workforce of St. James and St. John the Baptist Parishes, 39%. After the application of the affirmative action plan for one year, there was an increase in the proportion of black craftsmen or apprentices at the plant, from 1.83% to 4.43%. A. 167 (Kaiser Ex. 3).

2. The Standard and Its Application

An employer or union must not only have a reasonable basis for undertaking affirmative action, but it must also design measures which are appropriately related to the problems to be corrected.[92/] It is not possible to anticipate

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92/ "The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the

all the circumstances which would require the implementation of a race-conscious plan nor all the forms that a plan may take. The nature of the plan and its justification will vary according to the circumstances. But it is possible, as the EEOC has done in its Guidelines on Affirmative Action, to establish some guides for unions and employers to follow in designing proper plans.[93/] The standard for determining whether a

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92 / Cont'd

victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.4(c).

93/ "In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards: (i) The plan should be tailored to solve the problems which were identified in the self analysis, see §1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives. (ii) Goals and timetables should be reasonably related to such considerations as

particular kind of action is appropriate, like the standard for determining whether there is a reasonable basis for the institution of affirmative action, must be flexible and designed to encourage voluntary implementation of measures which will effectively remedy discriminatory practices. The plan adopted by Kaiser and the Steelworkers was properly designed and implemented for several compelling reasons.

a. The remedy established by the plan -- including the use of a ratio to insure a proper timetable for the remedy and the establishment of a goal to insure a proper duration for the plan -- has been repeatedly approved by courts in litigated cases[94/] and in negotiated settle-

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93/ Cont'd

the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available." 29 C.F.R. §1608.4(c)(2).

94/ See cases cited at pp. 18-19 nn.5-7, supra. See also Boston Chapter, N.A.A.C.P, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert.

ments.[95/] Furthermore, this form of race-conscious affirmative action has been adopted or

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94/ Cont'd

denied, 421 U.S. 910 (1975); Associated General Contractors of Mass., Inc. v. Altshuler, 361 F.Supp. 1293 (D. Mass), aff'd, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973), cert. denied, 421 U.S. 9 1 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3rd Cir. 1974); N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023 (6th Cir. 1973); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973).

95/ See, e.g., EEOC v. A.T.& T. Co., 556 F.2d 167 (3rd Cir. 1977), cert. denied, 57 L.Ed.2d 1161

approved by the federal agencies charged with enforcing the Executive Order,[96] Title VII and other fair employment provisions.[97] In fact, in adopting their plan Kaiser and the unions properly relied on the general requirements of the Executive Order and related judicial decisions and on the specific requirements which were instituted in the closely analogous situation involving the nationwide settlement in the steel industry, see pp. 56-58, supra. The adoption of the plan was consistent with the judicial decisions, the government regulations and the steel industry consent decree.[98]

95/ Cont'd

(1978); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

96/ See Section I, supra and pp. 104-06, supra.

97/ See Section I, supra.

98/ The majority below inaccurately distinguished the approval of the consent decree on the ground that there was a showing of "massive discriminatory practices" in the steel industry. G. Pet.

b. The affirmative action plan was appropriately designed to remedy the effects of prior discriminatory practices and to insure that the Company and the Steelworkers did not engage in continuing discriminatory practices. Past craft selection practices of Kaiser had a severe adverse racial impact; despite the fact that blacks constituted 39% of the workforce and a substantial portion of the skilled workforce, they were practically excluded from entry into craft positions, see pp. 65-78, supra. If no affirmative action plan had been instituted, then blacks would have continued to be excluded from the craft jobs. Moreover, the plan was an interim measure designed

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98/ Cont'd

4a. In fact, there was no evidence submitted in that case concerning the discriminatory practices in the steel industry nor was there an admission by the steel companies or the Steelworkers that they had engaged in unlawful practices, United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1973). The effect of the lower court's standard requiring such evidence or such an admission would be not only to discourage voluntary affirmative action but also to discourage negotiated settlements in contested litigation.

to terminate after redressing prior discriminatory practices. Finally, the development of an expanded training program in conjunction with the plan was a responsible social action designed to provide some remedy for the discriminatory practices by business, unions, and others which had substantially limited the employment opportunities of blacks in the craft trades.

c. The affirmative action plan did not unnecessarily restrict the employment opportunities, nor frustrate the existing job expectations, of white workers. In fact, the plan actually increased these opportunities. G. Pet. 41a-42a (Wisdom, J., dissenting). A craft training program which was open to all incumbent workers, white as well as black, regardless of their prior experience in the crafts, was instituted as a basic part of the affirmative action plan. In the small training programs which Kaiser had operated between 1964 and 1971, employees had been eligible only if they had one to three years of prior craft experience, see p. 79, supra. Weber had never submitted a job bid for one of these prior train-

ing programs because he did not have the requisite experience. A. 38, 43 (Weber).[99] Weber admitted that under the new program he, and other white workers, had expanded training and employment opportunities. A. 51. Ironically, were it not for the affirmative action plan, Weber would never have had the opportunity to become a craftsman at Kaiser; under the program he will have that opportunity.

d. The affirmative action plan was the product of collective bargaining between the Steelworkers and Kaiser. Collective bargaining is the cornerstone of federal labor policy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), and central to that policy is the principle of majority rule. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). However, "Congress did not ... authorize a tyranny of the

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99/ "There were prior training programs, but I was not allowed to participate because I didn't have the training required by the company, at that time." A. 38. The single class member who testified, Fortune Moran, had submitted a bid for one of the prior training programs; but he had been rejected because he lacked the requisite prior experience. A. 56.

majority over minority interests." Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 64 (1975). A union has a duty to fairly represent its minority members and to bargain in a manner consistent with "the national labor policy [which] embodies the principles of non-discrimination as a matter of highest priority." Id. at 66. The union's "duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if it requires assisting some of its members more than others." Franks v. Bowman Transportation Co., supra, 424 U.S. at 778-79.

Kaiser understood that it had a serious problem: its selection practices had resulted -- and without a race-conscious training program would continue to result -- in the employment of disproportionately few black workers in the craft positions. See pp. 56-57, supra. In accordance with its collective bargaining obligation, Kaiser raised this issue with the bargaining unit representative, the Steelworkers. For many years, one of the Steelworkers' collective bargaining goals was the establishment of an extensive craft

training program which would be open to employees who had no prior experience. A. 85 (English). If Kaiser had simply selected craft trainees from the area workforce which was 39% black, it could have achieved in effect, with some affirmative recruiting, its plan to enlist one minority for each non-minority without any specific numerical provisions in its affirmative action plan. But the selection of new hires for the training program ran counter to the Union's longstanding interest in expanding employment and training opportunities for incumbent workers.

The compromise which was agreed upon -- the affirmative action plan -- allowed both parties to attain the goals which they had brought to the bargaining table. The Company established a realistic plan for increasing its force of black craftsmen and the Union expanded the job opportunities for all the workers at the plant. This creative and cooperative resolution of a grave social as well as industrial problem furthered both the national policy favoring collective bargaining and the national policy favoring the voluntary correction of discriminatory employment practices. Such solutions should be strongly supported.

CONCLUSION

The amici urge that the affirmative action plan instituted by Kaiser and the Steelworkers be approved and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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January, 1979.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief *Amici Curiae* of the Hon. Patricia Schroeder, Member of Congress, and The ACLU Women's Rights Project, Chicana Service Action Center, Creative Employment Project, Equal Rights Advocates, Inc., Federally Employed Women, Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Association of Black Women Attorneys, Inc., National Conference of Puerto Rican Women, Inc., National Federation of Business and Professional Women's Clubs, Inc., National Women's Employment Project, National Women's Political Caucus, National Organization for Women, NOW Legal Defense and Education Fund, Organization of Chinese American Women, 60 Words Per Minute, Skilled Jobs for Women, Inc., Wider Opportunities for Women, Inc., Women Employed, Women in Apprenticeship Program, Inc., Women in Construction Project, Women Working in Construction, Women's Division of R.T.P., Inc., Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, Women's International League for Peace and Freedom, and YWCA Women's Trade Center

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[Counsel listed inside front cover]

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TABLE OF AUTHORITIES

Cases: Page

Advocates for Women v. Marshall, Civ. Action No. 76-0862 (D.D.C. Feb. 4, 1977).....47,App.B

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)....57,69,79

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).....56

Associated Gen'l Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).....64

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).....31,33

Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n., 482 F.2d 1333 (2d Cir. 1973).....65

Bunting v. Oregon, 243 U.S. 426 (1917).....35

Burrell v. Kaiser Aluminum & Chemical Corp., Civ. Action No. 67-86 (M.D. La. Feb. 24, 1975).....82

Califano v. Webster, 430 U.S. 313 (1977).....14,15

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).....65

Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).....63-64,66

EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, ___ U.S. ___, 98 S. Ct. 3145 (1978).....50-51,65

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).....69

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976).....47

Frontiero v. Richardson, 411 U.S. 677 (1973).....14,16

Goesart v. Cleary, 335 U.S. 464 (1948).....34

General Electric Co. v. Gilbert, 429 U.S. 125 (1976).....69

Griggs v. Duke Power Co., 401 U.S. 424 (1971).....53,69,79

Hazelwood School District v. United States, 433 U.S. 299 (1977).....78

Jordan v. Wright, 417 F. Supp. 42 (D. Ala. 1976).....27

Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970).....64

Kahn v. Shevin, 416 U.S. 351 (1974).....14,15,43

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).....54

Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974).....45,46,47,65

Muller v. Oregon, 208 U.S. 412 (1908).....34,35

NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).....65

Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973).....64

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).....64-65

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978).....82

Payne v. Travenol Laboratories, Inc., 416 F. Supp. 248 (D. Miss. 1976).....27

Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978).....15-16,63, 80,81,86

Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).....65

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).....79

Schlesinger v. Ballard, 419 U.S. 498 (1975).....14

Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).....64

Teamsters v. United States, 431 U.S. 324 (1977).....78

United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972).....65

United States v. IBEW Local 38, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970).....65

United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).....64,66

United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973).....46,65

United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973).....65

Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216 (5th Cir. 1977).....12,14,79

Statutes:

Equal Pay Act, 29 U.S.C. § 206(d)(1).....10,21,69

Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq.....21,53-58,59-71

Orders and Regulations

EEOC Guidelines on Affirmative Action, 44 F.R. 4422 (1979) (to be codified in 29 C.F.R. Part 1608).....68-71,76-77

Women and Minorities in Construction, 43 F.R. 14899 (April 7, 1978) (to be codified in 41 C.F.R. Part 60).....24

13 C.F.R. Part 311 (1978).....10

41 C.F.R. Part 60-2 (1971) (Revised Order No. 4).....69

47 C.F.R. Part 21.307 (1977).....10

Executive Order 11246, 30 F.R. 12319 (1965).....12,21,60, 62,69,80

Executive Order 11375, 32 F.R. 14303 (1967).....60

Executive Order 12067, 43 F.R. 28967 (1978).....68-69

Legislative History

H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963).....54

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971).....55

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971).....55

Subcommittee on Labor of the U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (1972).....65-67

Miscellaneous Other Authorities

J.B. Andrews and W.D.P. Bliss, History of Women in Trade Unions, 10 Report on Condition of Woman and Child Wage Earners in the United States.....36

B. Babcock, A. Freeman, E. Norton and S. Ross, Sex Discrimination and the Law (1975).....22,32,33,34,36,37

Baxandall, America's Working Women: A Documentary History -- 1600 to the Present xiv (1976).....31,37

D. Bem and S. Bem, "Are Women Interested in Construction Jobs: The Role of Affirmative Action" (Stanford University, Department of Psychology 1977).....47

Boulding, "Familial Constraints on Women's Work Roles," 1 Signs: Journal of Women in Culture and Society, Number 3, Part 2 (Spring 1976).....31

W. Chafe, The American Woman: Her Changing Social, Economic, and Political Role, 1920-1970 (1972)..37,38,39,40,41

Economic Report of the President, "Economic Role of Women" (1973).....23

C. Epstein, Woman's Place (1970).....44

Evans, "Sexual Harassment: Women's HIdden Occupational Hazard," The Victimization of Women (J.R. Chapman, M. Gates, eds. 1978).....28

Falk, "Women and Unions: A Historical View" 1 Women's Rights Law Reporter 54 (1973).....37

E. Flexner, Century of Struggle (rev. ed. 1975).....30,31

V. Gornick and B. Moran (ed.) Women in Sexist Society (1971).....44

Hartmann, "An Historical View of Women's Work in the United States," 70 Current History 215 (May 1976).....30

Hedges, "Women Workers and Manpower Demands in the 1970's," Monthly Labor Review 19 (June 1970).....22

L.B. Johnson, "To Fulfill These Rights," 2 Public Papers of the President 1965 (June 4, 1965).....42

R. Kanter, Men and Women in Organizations (1977).....44

Lapidus, "Occupational Segregation and Public Policy: A Comparative Analysis of American and Soviet Patterns," 1 Signs; Journal of Women in Culture and Society, No. 3, Pt. 2 (Spring 1976).....29

Laws, "Work Aspiration of Women: False Leads and New Starts," 1 Signs: Journal of Women in Culture and Society, No. 3, Pt. 2 (1976).....27,28

G. Lerner, The Grimke Sisters of South Carolina (1967).....32

C. Loomis, "A.T. & T in the Throes of Equal Employment," 99 Fortune 44 (January 15, 1979).....51

G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (Twentieth Anniversary Edition 1944).....16

Oppenheimer, "The Sex-Labeling of Jobs," Industrial Relations (May 1968).....22

L.J. Rupp, Mobilizing Women for War: German and American Propaganda, 1939-1945 (1978).....40

T. Simcich, Council on Economic Priorities, Shortchanged Update (1976).....25

Simmons, Freedman, Dunkle, and Blau, "Exploitation From 9 To 5," Background Paper for the Twentieth Century Fund Task Force on Women and Employment (1974).....22

"State and National Apprenticeship Systems Report" for January 1, 1977 - December 31, 1977.....24

State of California, Department of Industrial Relations, Division of Apprenticeship Standards, "Growth of Women Apprentices in California 1967-1978" (Chart, February 4, 1977).....49

U.S. Commission on Civil Rights, Jobs and Civil Rights (1969).....48

U.S. Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August 1978).....26

U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings....19,20,23,24

U. S. Department of Labor, Bureau of Labor Statistics Report 536, Work Experience and Earnings in 1975 by State and Area (August 1978).....21

United States Department of Labor, Manpower Administration, Manpower Report of the President (1972).....25

U.S. Department of Labor, Women's Bureau, 1975 Handbook on Women Workers (1975).....20

U. S. Department of Labor, Women's Bureau, The Earnings Gap Between Women and Men (1976).....21

U. S. Department of Labor, Women's Bureau, Women Workers Today (1976).....25

L.R. Walum, The Dynamics of Sex and Gender: A Sociological Perspective (1977).....44

B. Wertheimer, We Were There: The Story of Working Women in America (1977).....30,32

M. Whalen, National Council on Women, Work and Welfare, Women, the Poorer Sex (1978).....19

Wolfson, "Trade Union Activities of Women" 143 Annals of the American Academy of Political and Social Science 123 (May 1929).....37

INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Honorable Patricia Schroeder, Member of Congress, and the ACLU Women's Rights Project, the Chicana Service Action Center, the Creative Employment Project, Equal Rights Advocates, Inc., Federally Employed Women, the Federally Employed Women's Legal and Education Fund, the League of Women Voters of the United States, the National Association of Black Women Attorneys, Inc., the National Conference of Puerto Rican Women, Inc., the National Federation of Business and Professional Women's Clubs, Inc., the National Organization for Women, the NOW Legal Defense and Education Fund, National Women's Employment Project, National Women's Political Caucus, the Organization of Chinese American Women, 60 Words Per Minute, Skilled Jobs for Women, Inc., Wider Opportunities for Women, Inc., Women Employed, Women in Apprenticeship Program, Inc., the Women

in Construction Project, Women Working in Construction, Women's Division of R.T.P. [Recruitment and Training Program], Inc., the Women's Equity Action League, the Women's Equity Action League Educational and Legal Defense Fund, the Women's International League for Peace and Freedom, and the YWCA Women's Trade Center with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

Representative Schroeder and each of these groups are committed to the elimination of discrimination in employment on the basis of sex, race, and national origin; to the achievement of meaningful occupational choice for women and minorities; and to effective enforcement of the laws and regulations guaranteeing equal employment opportunity. The groups include both national and local membership organizations,

as well as public interest projects whose particular concern is equal employment opportunity. They represent thousands of working women -- construction workers, government workers, lawyers, secretaries, bookkeepers, business owners, laundry workers, insurance and bank administrators. They include white women, black women, Puerto Rican women, Chicana women, and Asian American women; women who are represented by unions and those who are not. Amici share a deep conviction that, if reasonable, voluntarily-adopted, race- or sex-conscious affirmative action programs such as that at issue in this case are invalidated, the national policy mandating equal employment opportunity for women and minorities will become an empty promise, virtually unattainable for generations to come.

A full description and statement of interest of each of the organizations is set forth in Appendix A, infra.

SUMMARY OF ARGUMENT

I.

No case could be more appropriate for upholding the adoption of affirmative action than the case at bar. Here, a union and an employer voluntarily created, in the collective bargaining process, a program to train unskilled workers in the skilled crafts. Moreover, to ameliorate the vast under-representation of blacks in the skilled trades, they agreed that one-half the trainees in the program would be black. While no specific finding that either the employer or union had itself discriminated against blacks was made below, well-recognized exclusionary practices of training programs in other fields contributed to the near-total absence of qualified blacks in the pool of skilled crafts workers. In these

circumstances, no other remedy could effectively or reasonably be utilized to achieve the goal of equal employment opportunity for blacks.

Women, too, bear the burden of a history of exclusionary employment practices that bar them from the higher-paying skilled trades (as well as from other higher-paying occupations). The same remedies -- including the voluntary adoption of specific numerical goals for training programs -- are required to make equal employment opportunity more than a meaningless phrase for women.

II

The inferior position of women in the present-day labor force can only be described as a serious national problem. Women are the majority of the nation's poor. They earn, on the average, under 60% of

what men earn. Segregated into low-paying, low-status "women's jobs," they are vastly under-represented in the skilled trades and in executive and professional positions.

This unfortunate situation is the result of a historical record of legal and customary exclusionary practices, traceable from colonial times, that rest on the ancient view that women's proper sphere is the domestic one.

Because sex-based employment discrimination stems from so long and deep-rooted a past, simple prohibition of its continuation is completely ineffective as a tool for improving the economic lot of women. Without specific numerical goals, the small but significant successes of recent affirmative action programs would not have been achieved. This is especially true in non-traditional employment, where barriers to women's entrance have been particularly strong.

III

The purpose of Title VII of the Civil Rights Act of 1964 was to overcome these effects of the "lengthy and tragic" history on the employment status of women and minorities. Congress also intended that the objectives of Title VII be achieved, as much as possible, through voluntary compliance on the part of employers and unions, without resort to the courts. Congress could not, consistent with these intentions, have intended at the same time to preclude use of effective remedies absent a finding or admission of violation of the statute.

The legislative history of Title VII, makes clear that Congress did not intend to prohibit reasonable, voluntary affirmative remedies involving numerical goals. To

the contrary, the one reference to "preferential treatment" (§ 703(j) of the Act) implies precisely the opposite. Congress' actions in amending Title VII in 1972 show, if anything, approval of affirmative action goals. Furthermore, this interpretation is supported by the guidelines that the Equal Employment Opportunity Commission, the lead enforcement agency in this area, has promulgated.

The standard for allowing affirmative action goals adopted by the majority below, however, effectively nullifies the Congressional purpose. If use of affirmative action goals depends on an admission or finding of discrimination under Title VII, then it is extremely unlikely that such actions will be undertaken voluntarily.

IV.

Whatever the boundaries for permissible numerical goals for women and minorities may be, the affirmative action provisions at issue here fall well within a protected "zone of reasonableness." The serious underrepresentation of blacks in the skilled trades at the Gramercy plant (even apart from the other indications of race discrimination on the part of Kaiser) makes out a prima facie case of discrimination under Title VII. Under these circumstances, Kaiser's affirmative action training program was the appropriate response. Moreover, the particular action taken here -- which afforded new training opportunities to whites as well as blacks -- was reasonably tailored to address the dearth of skilled black workers. So reasonable a program should not be held violative of the very statute with which it was designed to comply.

ARGUMENT

I.

INTRODUCTION

Recognizing that women and minorities have been the victims of a lengthy and unfortunate history of pervasive discrimination in the employment sector, Congress in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., made a national commitment to the achievement of equal opportunity in employment.[1/] At stake here is

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1/ Indeed, the commitment to equal employment opportunity is reflected in numerous federal statutes (e.g., the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970)) and federal regulations (e.g., Federal Communications Commission, Equal Employment Opportunities, 47 C.F.R. § 21.307 (1977) and Economic Development Administration, Nondiscrimination, 13 C.F.R. § 311 (1978)) and in statutes guaranteeing equal employment rights in 45 states and the District of Columbia.

the permissibility, not of affirmative action generally, but of reasonable, limited affirmative action, arrived at through the collective bargaining process, designed to provide minorities and women with true equal employment opportunity by teaching them the skills which previous centuries of discrimination had denied them. Should this affirmative action provision be held unlawful, the Congressional purpose of insuring that women and minorities have the full economic and social benefits of integration into the workforce will be nullified.

The facts of this case illustrate sharply the need for some form of affirmative action to achieve improved workforce participation for previously excluded groups.

Kaiser Aluminum & Chemical Corporation ("Kaiser") operates a plant in Gramercy, Louisiana, a town with about 2,000 residents,

located about 50 miles from New Orleans.[2/] Kaiser's workforce is drawn from the surrounding two parishes, St. James and St. John the Baptist, which have a population that is approximately 46% black (Tr. 51). Yet in 1974, 16 years after the plant had opened -- and despite efforts motivated by a desire to increase and upgrade minority employment in compliance with the requirements of Executive Order 11246, as amended -- only five (approximately 2%) of the plant's 290 maintenance craft workers were black (Tr. 54).

Because, prior to the program at issue here, the Gramercy plant had provided no formal on-the-job training program in the skilled trades, the company's crafts workers were drawn almost exclusively from

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2/ Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting).

the pool of already qualified individuals in the surrounding community (Tr. 54-56). However, that available pool contained virtually only white males,[3/] for blacks, in southern Louisiana as elsewhere, had traditionally been excluded from all sources of training and experience in the trades.[4/] In fact, almost the only source of training available in the vicinity of Gramercy was the apprenticeship programs provided by the building trades, which black members "did not get into" until very recently (Tr. 56).

Under these circumstances, the creation of a training program, admission to which was explicitly tied to race (as well as to seniority and interest), was

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3/ Joint Exhibit A, "Stipulation" § 5 at 2.

4/ See infra, for a parallel discussion on women.

the only effective means that the employer and the union could use to erase the legacy of a "sorry record of continual exclusion."5/

The facts of this case are illustrative in another way, as well. Women, too, suffer the present-day legacy of a crippling record of employment restrictions that have had the effect of relegating them to the lowest-paying, lowest-status jobs.6/ Nowhere

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5/ Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting). Indeed, the underrepresentation of blacks here is the product of identifiable, specific discriminatory practices of the relatively recent past. There is even evidence that it resulted from Kaiser's own exclusionary practices. See pp. 77-86, infra.

6/ Time and again, this Court has acknowledged this "long and unfortunate history of sex discrimination" (Frontiero v. Richardson, 411 U.S. 677, 684 (1973)), and the resultant "disparity in economic condition between men and women" (Califano v. Webster, 430 U.S. 313, 317 (1977)). See also Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 353 (1974).

is this more true than in the skilled trades, as the situation at Kaiser's Gramercy plant indicates. There is no indication in the record that any woman had ever held a skilled crafts position at the plant. Even the collective bargaining agreement affirmative action provision reflected the on-going near-total exclusion of women in this industry: the nation-wide agreement required that only 5% of the trainees be women as opposed to the 50% figure imposed for blacks (Tr. 62).

Contrary to the suggestion of Mr. Justice Powell in Regents of the University

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[Footnote continued]
Out of concern for this disparity, this Court has sought to compensate women by upholding the constitutionality of laws providing direct economic advantages to them. E.g., Kahn v. Shevin (remedial tax advantage to widows); Califano v. Webster (favorable old-age benefit calculation). In contrast, the affirmative action plan at issue here attempts to address the problem of poverty at its root, by providing training and employment opportunities. It presents the hope of a long-range cure, and not just a palliative.

Of California v. Bakke, __ U.S. __, 98 S. Ct. 2733, 2755 (1978), although the severity of treatment tolerated in the institution of slavery does not have identical parallels in the historic treatment of women, the oppression of women as a class has indeed been extremely pervasive and debilitating.7/ Certainly in the employment context, the historical reality for women has been a

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7/ It is noteworthy that women's subordinate status may have provided the model for the legal status of slaves:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power. When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment -- linking together women, servants, mules, and other property -- could be invoked, as well as a great number of other passages of Holy Scripture.

G. Myrdal, An American Dilemma: The Negro Problem and Modern Domocracy 1073 (Twentieth Anniversary Edition 1964). See Frontiero v. Richardson, supra.

complex of legal and customary limitations, based on a false and restrictive perception of their proper and "natural" role in society, which has left a demonstrable, pervasive, and intractable legacy in the present-day workforce. One thing is clear: the employment patterns of women and blacks today are astonishingly similar, and both groups are severely disadvantaged.

America's promise of equal employment opportunity is meaningless as long as the present-day legacy of a history of exclusion from employment remains undisturbed. Action such as that taken in the present case, reasonably tailored to redress a particular effect of past exclusion, to wit, the lack of skilled minority and women crafts workers, must therefore be upheld. Only if such affirmative action is allowed will all individuals eventually be able to participate on an equal basis in employment.

II.

AFFIRMATIVE ACTION IS ESSENTIAL TO ACHIEVE THE FULL BENEFITS OF EFFECTIVE EQUAL EMPLOYMENT OPPORTUNITY.

A. Women As a Class Have Been and Continue To Be Severely Disadvantaged in Employment. 8/

The essential reality of women's position in the American economy today is that they represent the majority of the nation's poor. Women presently comprise two-thirds of all employees earning the

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8/ The history of discrimination and its legacy in the present employment status of blacks and other minorities in the United States present a similarly dismal picture. And minority women bear the burden of double oppression: their unemployment rate, for example, is three times that of white males. See n.22, infra. We anticipate that the parties and other amici will address the history and condition of racial and ethnic minorities more fully, however. We therefore confine ourselves to an analysis of the condition and history of women, which might otherwise not be presented to the Court.

minimum wage.9/ In 1976, 53.7% of adult women, but only 23.6% of adult men, had an annual income under $4,000. In 1975, 32.5% of all female-headed households lived below the federal poverty line, five times as many as male-headed households living below the federal poverty line. The situation for black female heads of households is even worse: 50.1% lived below the federal poverty line.10/

Women's poverty is the direct and inevitable consequence of their vastly inferior employment status. By every measure, women are on the lowest rungs of

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9/ U.S. Dep't. of Labor, Bureau of Labor Statistics, Employment and Earnings (June 1978).

10/ Maureen Whalen, Women, the Poorer Sex, 2, 6, 7 (National Council on Women, Work, and Welfare 1978). In 1978, 43% of women workers provided the sole support of their households. U.S. Dep't of Labor, Women's Bureau "Most Women Work Because of Economic Need," (Chart) (August 1978).

the employment ladder. While women are represented in increasingly large numbers in the labor force,[11] minority and white women alike remain confined to low-paying, low-status jobs with little or no realistic opportunity for advancement -- not by choice, but by operation of law and force of custom.

In 1975 women earned an average of only $7,531 -- 59% of men's average income of $12,770. Women college graduates' median earnings were $10,861, which was $1,909 less than the median for all men's earnings and $7,030 less than the median for men

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11/ As of November 1978, women represented 41.4% of all workers, and 50.5% of all adult women worked. U.S. Dep't of Labor, Bureau of Labor Statistics, Employment and Earnings at 47, Table A-40, and 68, Table A-42 (December 1978). Women's share of the labor force and their rate of participation in the labor force have been increasing steadily since at least the turn of the century. See, e.g., U.S. Dep't of Labor, Women's Bureau, 1975 Handbook on Women Workers, at 11, Table 2 (1975).

college graduates.[12] This earnings gap is widening: in 1955, men's earnings exceeded women's by 56.4%, while in 1974, men's earnings exceeded women's by 74.8% -- an increase of 18.4%.[13] The trend has continued despite the enactment of the Equal Pay Act in 1963 and Title VII in 1964, and the amendment of Executive Order No. 11246 to cover women in 1967.

The primary reason for this wage differential is that, for the most part, women work in a limited number of "women's jobs," which tend to be among the lowest-

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12/ U.S. Dep't of Labor, Bureau of Labor Statistics Report 536, Work Experience and Earnings in 1975 by State and Area, at 20, Table 5 (August 1978). Women have not earned more than 63.9% of men's income since 1955. U.S. Dep't of Labor, Women's Bureau, The Earnings Gap Between Women and Men 6 (1976).

13/ The Earnings Gap Between Women and Men, supra at 1, 6.

paying occupations.[14/] Over 25% of women workers are concentrated in occupations that are 90% or more female;[15/] 52% of women workers in 1960 were in occupations that were 70% or more female.[16/] The list of jobs in which women constitute the vast

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14/ Of course, even where women and men are employed in the same jobs, many women continue to be paid less, the Equal Pay Act notwithstanding.

15/ Hedges, "Women Workers and Manpower Demands in the 1970's," Monthly Labor Review 19 (June 1970).

16/ Oppenheimer, "The Sex-Labeling of Jobs," Industrial Relations 220 (May 1968). The sex-segregated structure of the American workforce has changed virtually not at all since 1900. Now as then, occupational segregation is so pronounced that it would require about two-thirds of women workers to change jobs for women's occupational distribution to match that of men. Simmons, Freedman, Dunkle, and Blau, "Exploitation From 9 to 5," Background Paper for the Twentieth Century Fund Task Force on Women and Employment Ch. 1 (1974), reprinted in B. Babcock, A. Freeman, E. Norton, and S. Ross, eds., Sex Discrimination and the Law 198 (1975) [hereinafter cited as Babcock et al.].

majority of workers is a litany of low-paid, low-status jobs in our society:[17/]

Secretaries	- 99.1% female
Prekindergarten and Kindergarten teachers	- 98.7%
Housekeepers	- 97.2%
Telephone Operators	- 95.3%
Sewers and Stitchers	- 95.2%
Keypunch Operators	- 93.2%
Waitresses	- 90.4%
Bookkeppers	- 90%
Cashiers	- 87%

At the same time, women's under-representation in the professions and highly-skilled, highly-paid blue-collar jobs is as dramatic as their saturation in low-paid, low-status jobs. In the professions, in 1970, women were only 3.6% of architects, 4.9% of lawyers and judges, 9.3% of physicians, and 1.6% of engineers.[18/] In

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17/ U.S. Dep't of Labor, Bureau of Labor Statistics, Employment and Earnings 153-54 (January 1978).

18/ Economic Report of the President, "Economic Role of Women" at 155, Table 33 (1973).

the trades women represent only 0.9% of carpenters, 0.2% of electricians, 0.5% of plumbers and pipefitters, and 1.6% of nonautomotive mechanics.[19/] Women currently constitute a miniscule portion of trainees in skilled crafts apprenticeship programs.[20/] Even in predominantly "women's" industries, women are substantially under-represented in the higher-level, higher-paid managerial positions. In many industries, large numbers of women are employed as clerical workers,

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19/ U.S. Dep't. of Labor, Bureau of Labor Statistics Employment and Earnings, supra at 153-54. The Department of Labor recently promulgated regulations requiring three-year hiring goals for women in construction, stating, "[a] review of statistics relating to women in the construction industry shows an almost total exclusion of women from employment." 43 F.R. 14899 (April 7, 1978) (to be codified in 41 C.F.R. § 60) (emphasis supplied).

20/ As of the end of 1977, women were only 2.2% of all apprentices nationwide. Even this figure is skewed by the large numbers of women in more traditionally female apprenticeships, such as that of barber/beautician. Although close to 60% of the apprenticeable trades are in the construction field, in 1977 only 1.06% of construction apprentices were women. "State and National Apprenticeship Report" for January 1, 1977-December 31, 1977.

while men fill managerial positions.[21/] The profile of women in the labor force is thus characterized by near-universal vertical stratification within occupations as well as by horizontal occupational isolation.

Another important indicator of women's inferior employment status is their unemployment rate, which in 1977 was 8.2%, 1.32 times men's rate of 6.2%.[22/] This

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21/ In 1971 60% of the women workers classified as "white collar workers" held clerical jobs, while over 70% of men so classified held professional, technical, or managerial positions. U.S. Dep't of Labor, Manpower Administration, Manpower Report of the President (1972). In the banking industry in 1975, although 63% of all employees were women, 83% of all office and clerical workers, but only 1.8% of all senior officers, were women. T. Simcich, Council on Economic Priorities, Shortchanged Update 6-8 (1976).

22/ Forty-four percent (3.4 million people) of the unemployed population in 1975 were women. Nearly one-half million of these were family heads. The unemployment rate for women family heads was 10%, compared with 6% for male family heads. U.S. Dep't of Labor, Women's Bureau, Women Workers Today (1976). When broken down by race and ethnic categories, the unemployment

unemployment measure includes only persons actively looking for work or waiting to be called back to a job from which they had been laid off; it does not reflect the potentially great number of "discouraged workers" who do not look for work because they perceive -- often on the basis of long but unsuccessful job-seeking -- that they have little or no chance of obtaining employment. Research indicates that a disproportionat number of such discouraged workers are women and minorities.[23/]

[Footnote continued]
disparity shows the increased hardship for minority women: black women's unemployment rate was 3.2 times that of white (majority) men; Puerto Rican women's, 3.78 times; Mexican American women's, 2.52 times; American Indians' Alaskan Natives', 2.64 times. Even white (majority) women's unemployment rate was nearly 1.5 times that of white (majority) men. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women at 30, Table 3.1 (August 1978).

23/ Social Indicators, supra at 28-29.

The pervasiveness of occupational segregation and the extent of unemployment among women establish that women do not truly have employment opportunities equal to -- or even approaching -- those of men. Working women also are severely handicapped in career advancement by a panoply of factors that tend to limit their work experience. As one commentator noted, "[a] description of the characteristics of 'women's occupations' reads like an inventory of disincentives [to positive work motivation]."[24/] These characteristics include disadvantageous assignment of work tasks to women;[25/] the

24/ Laws, "Work Aspiration of Women: False Leads and New Starts," 1 Signs: Journal of Women in Culture and Society No. 3, Part 2 at 33, 42 (Spring 1976) (emphasis in original).

25/ E.g., Payne v. Travenol Laboratories, Inc., 416 F. Supp. 248 (D. Miss. 1976) (women excluded from material handler jobs because those with heavy lifting jobs got available vacancies); Jordan v. Wright, 417 F. Supp. 42 (D. Ala. 1976) (policewomen not assigned to patrol, traffic, detective, or administrative divisions or to bureau of special

lack of successful career women to provide role models for working women; the lack of potential rewards -- e.g., increased pay, prestige or autonomy -- for excellent work;[26/] and sexual harassment and intimidation on the part of male superiors and co-workers.[27/] For women in non-traditional jobs, the negative impact of these factors is often aggravated.

[Footnote continued]
investigation). Subtle (or not so subtle) sexism in work assignments may have the effect of limiting women's promotional opportunities, since women may be prevented thereby from attaining work experience necessary for career advancement.

26/ Laws, supra at 41-42.

27/ Recent studies show that the incidence of sexual harassment in the workplace is very high, with findings ranging from 49% to 88%. In one study, all 401 working women interviewed stated they had suffered sexual harassment at work. Evans, "Sexual Harassment: Women's Hidden Occupational Hazard," in The Victimization of Women at 203, 204 (J.R. Chapman and M. Gates, eds. 1978).

B. Women's Present Employment Status Is the Product of a Long and Unfortunate History of Legal and Societal Discrimination.

Women's dismal employment picture did not arise in a vacuum. Rather, women's economic inequality is the inevitable product of a social structure which traditionally has excluded them from all "instrumental roles in political and economic life,"[28/] and a legal system which historically has relegated women to the status of little more than the domestic appendage to their husbands. Women's position has been justified by resort to the argument that their "natural" -- and therefore only permissible -- roles are those related to their biological maternal functions.

28/ Lapidus, "Occupational Segregation and Public Policy: A Comparative Analysis of American and Soviet Patterns," 1 Signs: Journal of Women in Culture and Society No. 3, Pt. 2 at 121 (Spring 1976).

In colonial times, women worked both in domestic employment and, to some extent, for pay outside the home.[29/] In the nineteenth century, as factory jobs and some educational opportunities[30/] began to open up to women, women increasingly worked outside the home. But most available jobs involved work that was an extension of housework -- e.g., in laundries, canneries, or textile and clothing industries -- and paid barely subsistence wages; the justification for low wages for women's work was the myth that women's employment was only temporary because they would soon get married, revert to their "true" vocation, and be supported

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29/ B. Wertheimer, We Were There: The Story of Working Women in America 12-13 (1977). See also, Hartmann, "An Historical View of Women's Work in the United States," 70 Current History 215, 216-17 (May 1976).

30/ E. Flexner, Century of Struggle, esp. Chap. II (rev. ed. 1975).

by their husbands.[31/]

Women were excluded by prevailing practice and by law from pursuing vocations other than the relatively low-paid ones acceptable for women. They were almost universally barred from practicing law, and the Supreme Court upheld these restrictions.[32/] Individual women's struggles to become doctors,[33/] and even to speak

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31/ Baxandall, Gordon, and Reverby, eds., America's Working Women: A Documentary History -- 1600 to the Present xv (1976). The basis for this argument -- that women don't need to work because men support them -- has been called the "fiction of the male head of household," because in any period of history for which data is available, between one-fifth and one-half of all heads of households were women. Boulding, "Familial Constraints on Women's Work Roles," 1 Signs: Journal of Women in Culture and Society No. 3, Part 2 at 95, 102-03 (Spring 1976).

32/ Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

33/ Flexner, Century of Struggle p. 117-24 (rev. ed. 1975).

publicly[34/] illustrate that occupational choice was extremely limited for all women.

Even in traditional women's occupations, only young, single women were expected to work, and then only temporarily.[35/] Teachers in many places were required by law to retire upon marriage.[36/] When women first entered factory work, boarding-house communities were set up to accommodate young, single women.[37/] The entire system contemplated the use of cheap, temporary female labor.

34/ See, e.g., G. Lerner, The Grimke Sisters of South Carolina (1967).

35/ The average working period for women at the turn of the century was between the ages of 15 and 25. Babcock, et al., supra at 24.

36/ B. Werthheimer, supra at 244.

37/ See B. Werthheimer, supra at 62-64.

Woman's position as belonging "in the divine ordinance, as well as in the nature of things" primarily to "the domestic sphere" (Bradwell v. Illinois, supra, 83 U.S. at 141 (Bradley, J., concurring)) was reinforced by legal and social restrictions in other spheres. Political disenfranchisement until 1920 was accompanied by limitations on women's legal rights that were the legacy of the common law. In all realms of their lives, women were subject to de jure restrictions that reduced them to the status of second-class citizens:

> By marriage, a woman lost the power to make enforceable contracts with other persons, including her husband, to retain her wages from work outside the home, to be paid for domestic work in the home, to sue and be sued, to manage and control her real property, to own personal property, to assert her claims in land or in equity or to receive the proceeds, to make a will or to choose her own domicile.[38/]

38/ Babcock, et al., supra at 562.

As the incidence of women's employment increased in the late nineteenth and early twentieth centuries, widespread enactment of "protective" labor legislation served further to limit their employment opportunities.[39/] Many state laws excluded women outright from "men's jobs" such as policing, mining, and bartending. The Supreme Court upheld such total exclusions against Equal Protection challenges as late as 1948.[40/]

Many states also passed legislation to reduce the intolerably long hours and to ameliorate poor working conditions prevailing in women's industries.[41/] While

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39/ For a review and analysis of such protective labor laws, see Babcock, et al., supra at 26-41.

40/ Goesart v. Cleary, 335 U.S. 464 (1948).

41/ By 1908, 19 states had enacted laws prohibiting night work or setting maximum hours for women. Babcock et al. at 28; see Muller v. Oregon, 208 U.S. 412, n.1 at 419 (1908).

such laws may have improved women's lot on the job, they also disqualified women from many higher-paying jobs, such as newspaper printers, street car conductors, and telegraph messengers, which required longer or different hours than those the laws permitted. For other jobs, women's competitive position vis a vis men was weakened by their legal incapacity to work longer hours.

Indeed, despite authority of this Court upholding maximum-hour legislation for women (Muller v. Oregon, 208 U.S. 412 (1908)), and later maximum limitations on men's work-hours (Bunting v. Oregon, 243 U.S. 426 (1917)), protective legislation for men was neither advocated by the labor movement nor enacted by legislatures. Unions did, however, support "protective" laws for women, recognizing that the interests of their predominantly male members would best be served by restrictions on their

lower-paid female competitors in the labor market.[42/]

Unions' discrimination against women has taken many other forms as well. Women have been excluded altogether from some unions, hindered in the formation of independent locals, organized into separate but unequal locals, and charged high dues or given low benefits. Unions have failed to organize women, barred women representatives from labor conventions, failed to

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42/ Babcock et al., supra at 36-37. The president of the Cigarmakers International Union made this view explicit in 1879:

> We cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws. No girl under 18 should be employed more than eight hours per day; all overwork should be prohibited. . . .

J. B. Andrews and W. D. P. Bliss, History of Women in Trade Unions, 10 Report on Condition of Woman and Child Wage-Earners in the United States.

support women's strikes, and supported occupational segregation and lower wages for women in collective bargaining.[43/] Union leaders' attitude toward women mirrors the view of women's place prevailing in the late nineteenth and early twentieth centuries:

> The growing demand for female labor . . . is an insidious assault upon the home; it is the knife of the assassin, aimed at the family circle -- the divine injunctions. It debars the man through financial embarrassment from family responsibility, and physically, mentally and socially excludes the women equally from nature's dearest impulse.[44/]

43/ See Chafe, The American Woman: Her Changing Social, Economic, and Political Role, 1920-1970 76-77 (1972); Babcock, et al. supra at 25; Falk, "Women and Unions: A Historical View," 1 Women's Rights Law Reporter 54 (1973).

44/ E. O'Donnell [Secretary of Boston Central Labor Union], "Women as Bread Winners -- the Error of the Age," American Federationist 4 (No. 8), October 1897, reprinted in Baxandall, et al., supra at 167, 168. Contemporary and present-day observers alike have attributed the unions' attitude toward women to (as one put it) "a tacit understanding in the great brotherhood of man, that woman's place was in the home." Wolfson, "Trade Union Activities of Women," 143 Annals 123 (May 1929) quoted in Babcock, et al., supra at 25.

Because unions often provide the major source of training in skilled trades, their exclusion of women has the further consequence that very few women have developed such specialized skills. Indeed, the lack of a qualified pool of women applicants is apparent in this case.

In the twentieth century, legal and social mechanisms restricting women's employment have persisted, despite the influx of women into the workforce (and into non-traditional jobs) caused by the two World Wars.[45/] Even during the Wars, discrimination against women remained rampant, especially in compensation. Social pressures

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45/ During World War II, 6.5 million women entered the labor force -- an increase of 57%. Two and one-half million took manufacturing jobs, two million clerical jobs. Chafe, supra, at 148.

against women's employment, expressed, for example, in popular media exhortations to women to fulfill their "highest purpose" through marriage, motherhood, and homemaking, were prevalent after the First World War.[46/]

These social attitudes were also expressed as legal barriers. Broad federal anti-nepotism legislation in effect during the 1930's served to push working wives out of the civil service. Many states and local jurisdictions "embarked on crusades to fire working wives."[47/] In 1930-31, 77% of school systems refused to hire women

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46/ Id. at 97-111. Even the women's colleges adopted special home economics programs to "educate" women to their proper roles.

47/ Id. at 108. Almost every state considered legislation to restrict the employment of married women. Such bills were enacted in about a dozen states.

who were married; 63% dismissed women teachers who married.[48/]

The end of World War II produced similar barriers to the continued employment of women war workers. Great numbers of women lost their jobs to men returning to the civilian labor force.[49/] Nor did that war appear to have a great, lasting impact on societal attitudes regarding women's proper role.[50/]

48/ Ibid.

49/ The enactment of veterans' preference laws also reduced women's employment opportunities. By granting veterans permanent employment and retention preferences in competitive government service, such laws severely limit federal and state job opportunities for women, the vast majority of whom are not veterans.

50/ Post-war public opinion surveys, for example, indicated that the majority of Americans opposed working wives. Chafe, supra at 178. See also L. J. Rupp, Mobilizing Women for War: German and American Propaganda, 1939-1945 (1978). Rupp argues that public attitudes regarding women's proper work allowed women to be man's "helpmate" in the war effort; no

Thus, the history of women's employment -- indeed, of the social, political, and economic status of women -- reflects a near-complete exclusion of women from any employment opportunities except the lowest-status and worst-paid. This exclusion is based on and justified by a complex of stereotypical and out-dated views about women's "nature."

Working women feel the effects of their unfortunate history today. Despite the enactment of laws prohibiting sex discrimination in employment, women's segregation into "women's jobs" remains extreme; the wage gap between women's and men's salaries has been increasing, not decreasing,

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[Footnote continued]
fundamental change in the belief that woman's primary role is as man's helpmate was necessary to achieve increased levels of women's mobilization. But cf. Chafe at 183-84.

in the last two decades; and much discriminatory treatment and attitudes remain unredressed and unchanged. Present measures to achieve true equal employment opportunity for women must be measured against this historical and economic background.

C. Given the Deep-seated, Pervasive, Discriminatory Employment Legacy, Affirmative Action Including Specific Numerical Goals Is the Tool Proven Necessary to Realize Equal Employment Opportunity.

Announcing the signing of Executive Order 11246 in 1965, President Lyndon Johnson observed that even if the rules are the same for all, a race cannot be run fairly unless the starting-line is the same for all.[51/] His observation has proved prescient

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51/ L.B. Johnson, "To Fulfill These Rights," 2 Public Papers of the President 1965 636 (June 4, 1965).

with respect to attainment of true job equality. Government prohibition of discrimination alone is not sufficient to achieve a job market that offers equal opportunity to women and minorities. Rather, the available evidence compels the conclusion that the national policy of which Title VII and Executive Order 11246, as amended, are an expression will not be achieved without affirmative action.

The primary reason that injunctions against discrimination are not enough was recognized by this Court in 1974. Discussing remedies for sex-based employment discrimination, Mr. Justice Douglas pointed out that "firmly entrenched practices are resistant to * * * pressures [such as Title VII's prohibition of sex discrimination]."[52/]

52/ Kahn v. Shevin, 416 U.S. 351, 353 (1974).

The history of women's exclusion from most spheres of employment illustrates just how "firmly entrenched" the practices and attitudes that exclude women are. The common belief learned by example in earliest family experience and confirmed in nearly every subsequent encounter -- that "woman's place is in the home" -- is too ingrained to be easily undone. Such attitudes are so deep-rooted that often an employer does not even realize that his perceptions and decisions about the performance of an individual woman employee are based on false stereotypes.53/

Long experience, attained in efforts

53/ The literature documenting the "undervaluation" of women's work is voluminous. See, for example, R. Kanter, Men and Women in Organizations (1977); L.R. Walum, The Dynamics of Sex and Gender: A Sociological Perspective (1977); C. Epstein, Woman's Place (1970); V. Gornick and B. Moran (eds.), Women in Sexist Society (1971).

to improve the employment status of both blacks and women, confirms that orders of non-discrimination alone are not sufficient. The experience of the judiciary itself suggests that the cure for discriminatory policies often requires more than a mere injunction against illegal conduct. Courts have often ordered programs with specific numerical hiring or promotion goals where simple non-discrimination orders have proven ineffective. For example, in Morrow v. Crisler,54/ the court of appeals required the Mississippi State Highway Patrol to adopt a temporary hiring quota where the district court's order, enjoining discrimination and mandating a recruitment program for blacks, had failed to produce more than six black officers (out of 91 newly-hired officers) in two years. Part

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54/ 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974).

of the reason for the court's holding rested on its doubt that "benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi."55/

Specific numerical hiring goals succeed where non-discrimination injunctions fail because they provide a mechanism for addressing precisely those aspects of discrimination that are based on "entrenched" behavior and beliefs. First and most important, numerical goals provide specific benchmarks by which non-discrimination can be measured. Second, it is well documented

55/ Id. at 1056. See also United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973), in which the court approved an order mandating specific goals and timetables when an 800-member union failed to increase its black membership to more than ten black members in the four years after it had been enjoined from discriminating.

that women and minorities are deterred from even seeking employment by their conviction that no jobs are available to members of their class. Public awareness of a commitment to hire (or, as in this case, to train) a specific number of women and blacks may begin to reduce the built-in discouragement that years of negative experience have created.56/ Third, the

56/ The court in Morrow v. Crisler, supra, recognized this factor when it ordered adoption of a hiring goal for blacks. See supra at 46. See also Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Affidavit of John M. Heneghan ¶ 10, filed in Advocates for Women v. Marshall, Civ. Action No. 76-0862 (D.D.C. February 4, 1977) (App. B, infra at B-6 - B-7).

A recent study establishes clearly the relationship between affirmative action assurances and job-hunting incentives. When women job seekers were informed that "federal law now requires that companies train and hire a certain percentage of women" for construction jobs each year, 70% of the women expressed interest in those jobs (1-1/2 times as many as those in a control sample who were not given the affirmative action notice). D. Bem and S. Bem, "Are Women Interested in Construction Jobs: the Role of Affirmative Action" (Stanford University, Department of Psychology 1977).

results of such affirmative action do not depend on individual complainants bearing the burden of proving that discrimination has occurred.[57/] Finally, it is only when a specified number of women and blacks are brought into a workplace that the stereotypical assumptions of their co-workers and supervisors will be challenged.

Thus, available results of the most recent affirmative action plans designed to bring women into non-traditional fields show that adoption of specific numerical goals produces substantial results, compared

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57/ See, e.g., U.S. Commission on Civil Rights, Jobs and Civil Rights 47-48 (1969). In addition to the difficulty of proving discrimination, the poverty of the discriminatee, the difficulty of finding a lawyer, the sense of futility engendered by the life experiences of individuals in disenfranchised groups, and the fear of retaliation may also provide strong disincentives to bringing charges.

with the inefficacy of other known techniques. In California, for example, the State Department of Industrial Relations required local labor-management coordinating committees to set local "realistic goals and timetables" for women's participation in apprenticeship programs in January 1976. By November of 1978, the number of active women apprentices had more than doubled, although for the nine years preceding the requirement female apprenticeship had remained at about the same level.[58/] Similarly, within four years after the Maritime Administration of the United States Department of Commerce began to require that federal contractors under its

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58/ State of California, Department of Industrial Relations, Division of Appenticeship Standards, "Growth of Women Apprentices in California 1967-1978" (chart, February 4, 1977). This data was brought up to date with information supplied by the Research Director of the Department of Industrial Relations on January 19, 1979.

jurisdiction satisfy goals and timetable requirements for women in blue-collar occupations, the percentage of women in such positions jumped from 0.3% to 4.7%.[59/]

American Telephone & Telegraph Company's compliance under its 1973 consent decree with the Equal Employment Opportunity Commission and the Department of Labor provides the final example of the impact of specific, numerical affirmative action. During the six years of that decree's term, women's representation in management increased from 2.1% to 6.9%; in outside craft positions, from 0.2% to 3.9%; and in inside craft positions, from 6.5% to 17.2%.[60/] According to the president of

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59/ Affidavit of John M. Heneghan, supra, ¶ 7, App. B, infra, at B-4 - B-5.

60/ Final Report filed in Equal Employment Opportunity Commission et al. v. American Telegraph & Telephone Co., Civil Action No. 73-149 (E.D. Pa. Jan. 17, 1979). The validity of this consent decree was upheld

the board of A.T.&T., the real benefits of the decree arose from its facilitation of employees' movement into new and non-traditional jobs.[61/]

The overwhelming consensus of private projects working to improve employment opportunities for women is the same: without specific numeric goals, women would simply not be placed in non-traditional jobs.[62/]

[Footnote continued]
in Equal Employment Opportunity Commission v. American Telegraph & Telephone Co., 556 F.2d 167 (3rd Cir. 1977), cert. denied, __ U.S. __, 98 S. Ct. 3145 (1978).

61/ C. Loomis, "A.T.&T. in the Throes of Equal Employment," 99 Fortune 44 (January 15, 1979).

62/ A number of projects geared specifically to placement of women in non-traditional fields join this brief as amici. They include: the Chicana Service Action Center of Los Angeles; the Creative Employment Project of Louisville; Skilled Jobs for Women, Inc., of Madison, Wisconsin; the Women in Apprenticeship Program, Inc. of San Francisco; the Women in Construction Project of Boston; Women Working in Construction of Washington, D.C.; the Women's Division of R.T.P. [Recruitment and Training Program], Inc., of New York City; and the

This is particularly true of minority women, who face double discrimination in the workplace. Moreover, it is even true where such projects provide counseling and training for both employees and employers to assist in the integration of women in the workforce. Indeed, if courts and administrative agencies did not impose specific numerical goals on employers and unions, thereby frequently motivating other employers and unions to adopt them voluntarily, it is doubtful that any gains could be made at all.

Both the inefficacy of other remedies, and the initial empirical successes of these remedies, compel the conclusion that the traditional barriers to women's employment in non-traditional occupations are most effectively removed through use of numerical goals and timetables for women's

[Footnote continued]
YWCA Women's Trade Center of Bellingham, Washington.

participation at entry levels. To outlaw their use would signal the death knell for present efforts to integrate minority and white women into the mainstream of the American workforce.

III.

THE USE OF AFFIRMATIVE ACTION GOALS IN THE ABSENCE OF ADMISSION OR FORMAL FINDING OF PRIOR DISCRIMINATION IS FULLY CONSISTENT WITH TITLE VII.

A. Affirmative Action Goals Are Consistent With the Purposes of Title VII.

In Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971), this Court stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

The legislative history establishes beyond

any doubt[63/] that Title VII was chiefly designed to remedy the exclusion of blacks, women and other disadvantaged groups from the full benefits of employment.[64/]

Moreover, when Congress undertook to strengthen Title VII by passing the Equal Employment Opportunity Act of 1972, P.L. 92-261, it relied on data showing "the economic disparities which presently affect this Nation's minorities and women" and the disproportionate under-representation of minorities in occupational groups (including craftsmen) as indicating that Title VII had so far failed to achieve its

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63/ See, e.g., H.R. Rep. No. 914, 88th Cong., 2d Sess. at 18-26 (1963).

64/ Of course, white males may in a proper case claim the protection of Title VII. McDonald v. Santa Fe Trial Transportation Co., 427 U.S. 273 (1976). The Court in that case specifically reserved the issue of the legality of race-conscious employment decisions made pursuant to an affirmative action program. Id. at 281 n.8.

objective.[65/] These same Congressional Reports noted a shift in the perception of what constitutes discrimination:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization * * * Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[66/]

It is apparent, therefore, that

65/ See S. Rep. No. 92-415, 92d Cong., 1st Sess. 6-7 (1971) and H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971).

66/ S. Rep. No. 92-415, supra at 5.

Congress viewed Title VII as a means of correcting the under-representation of minorities and women in employment, caused by historical discrimination and maintained by neutral "systems" and "effects," at least as much as a means of redressing individual acts of discrimination.

It is also apparent that Congress intended to encourage voluntary action on the part of employers as the most desirable method of achieving the purposes of Title VII. As this Court recognized in Alexander v. Gardner-Denver Co., "cooperation and voluntary compliance were selected as the preferred means for achieving this goal," and the Act created "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit."67/

67/ 415 U.S. 36, 44 (1974).

Even after the Equal Employment Opportunity Act of 1972 gave the Equal Employment Opportunity Commission the power to seek enforcement of Title VII through suits in federal district court, the preference for voluntary compliance was retained. In Albemarle Paper Co. v. Moody, this Court pointed out that back pay awards are an important method of effectuating this purpose:

> [They provide] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.68/

This preference for voluntary compliance was a practical necessity as well as an exercise in governmental restraint. If redress of discrimination

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68/ 422 U.S. 405, 417-18 (1975).

and its attendant effects had in every case to be accomplished by judicial enforcement, this highest priority would not be accomplished for generations and would place a most severe burden on the already overburdened federal judiciary. Congress therefore clearly hoped that employers and unions would take note of the statute itself and the developing case law which interprets it, and undertake self-examination and correction accordingly. Were appropriate remedies for disadvantaged groups available for use only after a finding or admission of guilt, there would be no incentive for employers and unions to correct employment disparities voluntarily. Congress must therefore have intended all such remedies to be available for immediate and voluntary use.69/

69/ Such voluntary action, if undertaken promptly, can generally be less drastic and more finely tuned to the needs and

B. Congress Did Not Intend That Title VII Forbid Affirmative Action Goals.

Congress not only intended Title VII as a catalyst to voluntary action to correct the historic exclusion of women and minorities from employment, but also interpreted it to permit the use of goals and timetables to increase the employment opportunities of minorities and women.

Three main factors compel this conclusion. First, the wording of Title VII as adopted in 1964, stating that such preferences were not "required" by the Act, necessarily implies that they were permitted. Second, in debating the 1972 amendments to Title VII, the Senate repudiated an amendment specifically designed to prevent

[Footnote continued]
practices of the industry than the relief which a judge would appropriately order if the employment practices were permitted to persist until litigation was completed.

the United States from seeking such goals in Title VII suits or requiring them of government contractors under Executive Order No. 11246, 3 C.F.R. 339 (1965), as amended by Executive Order No. 11375 (1967).[70/] Finally, the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, has published Guidelines interpreting the Act as permitting the voluntary adoption of such goals in circumstances like those presented here. We now consider each of these factors in turn.

Title VII addresses the question of racial and sexual preferences to correct underutilization in an employer's workforce or union's membership in only one place. Section 703(j) of the Act states that

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70/ Executive Order No. 11375 amended Executive Order No. 11246 to include sex as a prohibited basis for discrimination.

"nothing contained in this title shall be interpreted to require" the grant of preferential treatment because of an imbalance in the numbers of persons of any race, religion, color, sex or national origin employed or enrolled compared to their percentage in the population or workforce as a whole. 42 U.S.C. 2000e-2(j) (emphasis supplied). While this subsection makes it clear that Title VII does not impose remedial goals as a duty, it also by implication establishes that such goals are not outlawed by the Act. Had Congress intended a flat prohibition of such affirmative action efforts, it could easily have achieved that aim by the addition of the words "or permit" to the above-quoted portion of the subsection. That it did not do so, despite lively Congressional debate regarding remedial hiring, is surely significant.

This conclusion was indirectly confirmed in 1972 when Congress addressed a number of proposed amendments to Title VII.

Between the time Title VII was enacted and the time when it was amended by the Equal Employment Opportunity Act of 1972, the question of affirmative action goals had come to the attention of the public, the courts, and Congress in two separate contexts. First, the Office of Federal Contracts Compliance, in enforcing the strictures of Executive Order 11246, as amended, against discrimination by government contractors, had required that construction contractors submit with their bids acceptable affirmative action programs, including specific goals for minority manpower utilization. The reason for imposing these goals for the hiring of minority craft workers was the finding that minorities

had been excluded from the building trades by past discrimination, not on the part of the construction contractors themselves, but on the part of the crafts unions whose hiring halls furnish employees to contractors.[71/] Challenged in a number of such suits which alleged, inter alia, that they violated both Section 703(j), supra, and Section 703(a), the basic anti-discrimination provision of Title VII, these minority hiring requirements were consistently upheld.[72/]

71/ This recognition of past discrimination in the industry constitutes an administrative finding of discrimination which distinguishes the instant case from Regents of the University of California v. Bakke, __ U.S. __, 98 S. Ct. 2733 (1978).

72/ See, e.g., Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, 442 F.2d 159, 173 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) ("To read § 703(a) in the manner suggested by the plantiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either

Second, a number of district courts had imposed numerical goals as part of the relief ordered to remedy discrimination found to have violated Title VII. The rationale behind such orders, which have become commonplace since 1972, is that the chancellor in equity has the power and duty to eliminate discrimination and its effects. These orders, too, repeatedly have been held consistent with Title VII.[73/]

[Footnote continued]
from the language of the statute or from its legislative history. * * * We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades."); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Associated Gen'l Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973) cert. denied, 416 U.S. 957 (1974); Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970).

73/ See, e.g., United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395

During the debate on the Equal Employment Opportunity Act of 1972, Senator Ervin offered an amendment that would add to Title VII a provision that:[74/]

> No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular

[Footnote continued]
F.2d 920 (2d Cir. 1968); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973); Morrow v. Crisler, supra, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); United States v. Local 212, IBEW, supra, 472 F.2d 634 (6th Cir. 1973); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); EEOC v. American Telegraph & Telephone Co., supra 556 F.2d 167 (3rd Cir. 1977), cert. denied, __ U.S. __, 98 S.Ct. 3145 (1978).

74/ Subcommittee on Labor of the U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 1039 (1972).

> race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges.

During the ensuing debate, Senator Javits called attention to Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, supra, and United States v. Ironworkers Local 86, supra, and advocated defeat of the proposed amendment because it would preclude the types of numerical goals approved in those decisions. Id. at 1046-47. He also noted that the amendment would preclude consent decrees binding employers to prefer women and minorities for a specific percentage of future vacancies to correct alleged but unproven and unconceded past discrimination. Id. at 1071-72. The amendment was overwhelmingly rejected. Id. at 1075.

By this action, the Senate

acknowledged court determinations that, at least where imposed by a court or federal agency, numerical or percentage affirmative action goals of the type adopted in the instant case are consistent with Title VII, and declined to overrule those court determinations legislatively. Moreover, the section-by-section analysis of the Equal Employment Opportunity Act of 1972 as finally adopted by both Houses of Congress establishes an intent to ratify these judicial decisions:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law developed by the courts would continue to govern the applicability and construction of Title VII.

Id. at 1844.

In the face of this legislative history, it is difficult to maintain that

Congress understood or intended Title VII to prohibit race- or sex-conscious efforts to remedy underutilization resulting from past discrimination, at least where these measures were judicially or administratively mandated. And, as noted above, the wording of Sec. 703(j) of Title VII suggests that such efforts are permitted (though not required) even where, as here, there is no judicial or administrative mandate.

The inference that Congress intended to permit private, voluntary affirmative action is bolstered by the EEOC Guidelines on Affirmative Action.[75/] As the administrative interpretation of the Act by the enforcing agency,[76/] these Guidelines

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75/ 44 F.R. 4422 (1979) (to be codified in 29 C.F.R. Part 1608).

76/ Executive Order No. 12067, 43 F.R. 28967 (1978), gave EEOC the authority to coordinate and "provide leadership" in the enforcement of all federal laws and regulations governing equal employment

are entitled to great deference.[77/] The Guidelines interpret Title VII as permitting

[Footnote continued]
opportunity. This reorganization thus confirmed and enhanced the Commission status as "the enforcing agency."

77/ Griggs v. Duke Power Co., supra, 401 U.S. at 433-434; Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431. Although these Guidelines were adopted subsequent to the actions complained of in the instant case, and therefore cannot be relied on as a defense under Sec. 713(b)(1) of Title VII, the deference to which they are entitled is in no way diminished. This Court in Griggs similarly deferred to Guidelines published after the events in issue. 401 U.S. at 433, n. 9.

Nor is such deference diminished by General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), in which this Court declined to follow EEOC Guildelines on sex and national origin discrimination, respectively. In both those cases the Court noted that the Guidelines in question contradicted previous interpretations by the EEOC; moreover, in Gilbert they contradicted the Department of Labor's interpretations of the Equal Pay Act. Neither of these factors militating against deference are present here; on the contrary, the EEOC Guidelines on Affirmative Action are fully consistent both with its own prior interpretations and with the Department of Labor's OFCCP regulations implementing Executive Order 11246. See Revised Order No. 4, 41 C.F.R. Part 60-2.

an employer who discovers through self-analysis that his employment practices tend to have an adverse effect on the members of previously excluded groups, to adopt race- or sex-conscious affirmative action, including goals and timetables, to remedy the exclusionary effect. 29 C.F.R. 1608.4. An employer who finds that the available pool of qualified women and minorities is artificially limited because of historic restrictions may adopt training programs "which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions." 29 C.F.R. 1608.3(c). These steps may be taken without an admission or formal finding that the employer has violated Title VII. 29 C.F.R. 1608.4(b). As we demonstrate in Section III, infra, the actons of the Petitioners in the instant case are fully

consistent with the conduct which the Guidelines authorize.

C. To Require Admission or Formal Finding of Discrimination Before Affirmative Action Goals May Be Utilized is Impractical and Severely Undermines the Congressional Preference for Voluntary Compliance.

The requirement that a violation of Title VII be admitted or proved before affirmative action goals or quotas can themselves be found lawful under Title VII -- a requirement which the majority below would impose but which the Guidelines eschew -- is both impractical and inconsistent with the Congressional preference for voluntary amelioraton of the evils at which Title VII was directed. Its adoption would eliminate effective affirmative action.

Even those employers who recognize that their workforce statistics indicate a prima facie case of discrimination, and

who are aware of no justifying facts with which they could rebut the presumption so created, would be safer to continue the status quo. The possibility of a Title VII suit against them by women or minorities is clearly a more acceptable risk than to adopt affirmative action goals which would both create the risk of suit by whites or men and could be justified only by an admission of past discrimination, thus inviting a second suit and back pay liability to minorities or women.

The instant case well illustrates the point that discrimination may exist in the absence of admission or conclusive proof. Here the statistics for unskilled and craft jobs alike were such as to create a prima facie case of discrimination.[78/] Furthermore, there was no evidence

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78/ See infra at 77-78.

establishing the validity of either the procedures used to select unskilled employees, or the experience requirement used to select craft employees and trainees.

Both employer and union knew that these facts might render them vulnerable to a Title VII suit, and they were in the best position to judge whether they had any adequate defense to such a suit. Yet it was not in the interest of either of them to acknowledge or to prove at trial that they were discriminators. Still less was it in respondents' interest to prove discrimination on their part, since such proof would enhance the legitimacy of the disputed goals. The result here -- as might be expected in any "reverse discrimination" case -- was that no party marshalled the evidence for or urged a finding of past discrimination, and therefore the trial court found as an "undisputed fact" that

there was no past discrimination. The impracticality of requiring an admission or finding of discrimination to "legitimize" affirmative action goals could not be more convincingly illustrated.

The standard adopted by the majority below would not only bar voluntary affirmative action, but would prevent the compromise and settlement of Title VII actions through the adoption of consent decrees. Where the defendant employer believes his chances of prevailing in such a suit are slight, he is often willing to accede to a consent decree imposing negotiated and mutually acceptable relief. But since the defendant is naturally unwilling to admit discrimination in entering into such a decree, and the plaintiff would rarely be willing to accept a decree that did not impose corrective goals (which are the most effective means of correcting

discriminatory exclusion from employment[79/] and which are within the power of the court to grant to a prevailing plaintiff), settlement of Title VII class actions would be effectively precluded. Not only does this undercut "conference, conciliation and persuasion" as the preferred means for resolving Title VII disputes, but it places on the courts the considerable burden of having to try at least the issue of discrimination vel non in every Title VII class action filed. Congress could not have intended such a result.

IV.

AFFIRMATIVE ACTION GOALS LIKE THOSE IN THE INSTANT CASE WHICH ARE A REASONABLE REMEDY FOR UNDERUTILIZATION OR HISTORIC ARTIFICIAL EXCLUSION SHOULD BE PERMITTED, WITHOUT REQUIRING PROOF OR ADMISSION OF DISCRIMININATION.

While proof or admission of

79/ See Section II-C, supra.

discrimination is an unrealistic requirement on which to condition the legitimacy of sex- and race-conscious affirmative action, neither would it be reasonable for all types of preferences adopted by employers in all types of circumstances to be deemed unassailable under Title VII so long as they are termed "affirmative action." The answer, as Judge Wisdom suggested in his dissent below, is the recognition of a "zone of reasonableness" within which the employer and union would be sheltered from liability for their affirmative action efforts.

The EEOC Guidelines delineate the proper boundaries of such a "zone of reasonableness." They set two important limits on permissible affirmative action, defining when such action may be taken and what form it may take.

The Guidelines state that the employer

or union may take affirmative action if self-analysis discloses employment practices which: (1) have an adverse impact on previously excluded groups, or those whose opportunities have been artifically limited; or (2) leave uncorrected the effects of prior discrimination (as identified by a comparison between the employer's work force or a part thereof and an appropriate segment of the labor force); or (3) result in disparate treatment. 29 C.F.R. 1608.4(b).

It would be difficult to imagine a fact situation more clearly calling for affirmative action than the one which Kaiser and the Steelworkers faced during their 1974 contract negotiations. Both employment practices with an adverse impact on groups whose opportunities had been artifically limited, and practices leaving uncorrected the effects of prior discrimination, were

clearly present.[80] In short, even this meager record discloses a prima facie case of discrimination.

The work force in the two parishes from which Kaiser Gramercy drew its employees was 39 percent black (Tr. 50-51), but blacks comprised about two percent (5 out of 290) of Kaiser's craft employees (Tr. 54, 57), and no more than 10 to 11 percent of its production employees (Tr. 50), before the one-for-one hiring system for production jobs was begun in 1969. These figures by themselves make out a prima facie case of discrimination.[81]

80/ In contrast, there was no evidence in Regents of the University of California v. Bakke, supra, that the medical school had adopted admissions policies that were prima facie discriminatory against disadvantaged groups.

81/ Hazelwood School District v. United States, 433 U.S. 299, 308-09, n.14 and accompanying text (1977); Teamsters v. United States, 431 U.S. 324, 339, n.20 and accompanying text (1977).

Moreover, it does not appear that Kaiser could have rebutted the presumption of discrimination thus created. Prior to 1969 it had selected production workers by hiring the "most qualified" at the gate (Tr. 79); there is no evidence that the selection standards it used to determine qualification were validated.[82] Similarly, it had insisted upon previous craft experience as a prerequisite for hire into craft jobs. This requirement, certainly a "built-in headwind" for minorities and women,[83] cannot have been a business necessity,[84] since the 1974 contract

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82/ See Albemarle Paper Co. v. Moody, supra, 422 U.S. at 430-31.

83/ As Judge Wisdom observed below, judicial findings on discrimination in the crafts are so common as to make it a proper subject for judicial notice. 563 F.2d at 235.

84/ See Griggs v. Duke Power Co., supra, 401 U.S. at 431-32; Robinson v. P. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

recognized training as a feasible alternative.[85/]

Indeed, the federal agency charged with monitoring Kaiser's EEO performance as a government contractor had concluded that its employment practices did not comply with the non-discrimination requirements of Executive Order 11246, as amended, and its implementing regulations.

In 1971 and 1973, EEO compliance

85/ As Mr. Justice Powell noted in Regents of the University of California v. Bakke, supra, ___ U.S. ___, 98 S. Ct. at 2758, n.44, the presumption that disparate impact without any showing of business justification establishes the existence of discrimination in violation of Title VII "was based on legislative determinations, wholly absent [in Bakke], that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination." The absence of such "detailed legislative consideration of the various indicia of previous constitutional or statutory violations," (id. at 2755, n.41) in Bakke distinguishes it from the case at bar.

reviews of the Gramercy plant[86/] disclosed a number of violations, including inadequate recruiting, unvalidated experience requirements for entry into craft positions, and waiver of these experience requirements for white (but not for black) transferees.[87/]

Thus Kaiser and the USWA were confronted not merely with their own extreme underutilization of minorities and women, but with evidence sufficient (insofar as it is ever possible to foresee the outcome of litigation) to prove a violation of Title VII against them. Both employer and union

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86/ Documents pertaining to these reviews were lodged with the Clerk of this Court in connection with the Petition for a Writ of Certiorari filed by the United States of America and the Equal Employment Opportunity Commission.

87/ Such an administrative finding of discrimination establishes a predicate for race-conscious remedial action that was totally absent in Regents of the University of California v. Bakke, supra.

could not fail to be concerned that they ran the risk of a costly, embarrassing and morale-destroying Title VII suit,[88] and their concern was not unfounded.[89] Ordinary prudence (as well as the social

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88/ The union, in representing Respondent and the other white male employees who constituted a majority of its membership, must have been conscious that any back pay liability which might be assessed against it in the event of successful suit would be indirectly borne by its members; the consequences of any loss of governmental contracts by Kaiser through failure to comply with Executive Order 11246, as amended, would be felt even more directly by its members facing layoff.

89/ Contemporaneously with the case at bar, black employees of Kaiser in two other Louisiana plants filed employment discrimination suits. In one case, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), the court found a prima facie case of discrimination by company and union against blacks in hiring for craft positions on the basis of statistics similar to those present here. In the other, Burrell v. Kaiser Aluminum & Chemical Corp., Civ. Action No. 67-86 (M.D. La., February 24, 1975), a consent decree was filed on February 24, 1975 in which Kaiser agreed to pay $255,000 to the plaintiff class.

policy which generated Title VII) dictated that they should take steps to eliminate the imbalance which would be the chief evidence against them in the event of suit. Surely they should not have been prohibited from taking action in these circumstances, and thereby have been placed in the untenable position of having to choose by whom they would be sued first: blacks for discrimination, or whites for "reverse" discrimination.

Indeed, Kaiser did take limited action to redress the situation: for the noncraft jobs -- the production jobs -- it began hiring blacks and whites on a one-for-one basis in 1969. (Tr. 85). For these jobs it even ventured to hire four women (Tr. 61).

For the craft positions, Kaiser similarly had tried a number of

noncontroversial devices to increase black representation, such as advertising in black-oriented newspapers and undertaking to complete the craft training of production employees--white or black--who already had some such training (Tr. 55, 57, 68). Still, only five black craftsmen were hired.

In light of this statistical evidence, use of unvalidated selection standards with adverse impact on previously excluded groups, and failure of more limited efforts to correct the effects of such exclusion,[90/] Kaiser and the USWA clearly had a reasonable basis for undertaking affirmative action.

90/ The record contains, in addition, a virtual admission of past discrimination by the employer. Mr. Thomas M. Bowble, Equal Opportunity Affairs Director for the entire Kaiser Corporation (Tr. 96), testified that "I don't think there is any employer in the United States, prior to a given time in our history, that didn't practice employment discrimination in some form" (Tr. 125).

With regard to the proper boundaries of such action, the EEOC Guidelines provide that the plan may include the adoption of goals and timetables which are race- and sex-conscious and which enhance opportunities for members of groups which have previously been excluded. That action must, however, be directly tailored to solving the problems identified in the self-analysis, must be limited accordingly in duration, and must avoid unnecessary restrictions of opportunities for the workforce as a whole.

The plan adopted in this case was wholly consistent with these standards and admirably tailored to remedy the problem which the employer and union had identified and which more modest measures had failed to cure. Rather than depriving any employees of existing rights, it added new opportunities; rather than limiting these

opportunities solely to the under-represented classes, it afforded them to white males as well.

The 1974 contract provided for the first time that the plant would train bargaining unit employees who had no craft experience in the skilled crafts. Half the trainees were to be white and half black. (Joint Exhibit A, Stipulation 4.) Without this agreement, none of the Respondents would have had any opportunity for craft training.91/

Nor was there any question of preferring less qualified employees over

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91/ This expansion of opportunities for the workforce as a whole sharply contrasts with the minority preference in Regents of the University of California v. Bakke, supra, where the minority admissions program limited respondent's opportunity to enter medical school. Here, no expectations of white male workers were diminished by the mode of affirmative action adopted.

those more qualified. Qualifications played no part in the selection of employees for craft jobs; all transferees were unqualified when chosen and were to become qualified through training.

Finally, the program was limited in duration to the length of time necessary to correct the underutilization which prompted it.92/

Thus, the employer and union in the instant case proceeded reasonably in perceiving the need for affirmative action and in adopting an effective yet non-Draconian plan. Their action was fully consistent with the EEOC Guidelines, which

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92/ The national collective bargaining agreement requires that apprentice and craft jobs be filled on a one-for-one basis (at a minimum) "until the goal is reached." Joint Exhibit A, "Stipulation" § 4 at 2. Goals were set for each plant on the basis of the percentage of minorities in the available workforce. Tr. 51-52.

are themselves clearly consistent with Title VII and its legislative history. They are responsive to the needs of employers and unions, affording them an opportunity to take action which lessens the risk of successful suit by minorities, women or the Federal government without thereby increasing the risk of successful suit by white male employees. They accommodate the needs of white male employees, since they require affirmative action efforts to be limited in scope and duration to those reasonably necessary to correct the effects of discrimination and artificial exclusion. Finally, they are responsive to the needs of minorities and women, and to the national interest in halting the move toward two societies, separate and unequal, and moving instead toward one society with full

utilization and participation of all, regardless of sex, race, or national original.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment and order of the court below should be reversed.

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We wish to acknowledge the advice and assistance of Professor Wendy Webster Williams of the Georgetown University Law Center, the participation of the student interns of the Antioch School of Law Women's Rights Clinic, and the typing assistance of the Word Processing Center of Arnold & Porter.

APPENDIX

APPENDIX A

Statements of Interest of Individual Organizations Amici Curiae

Recognizing that role-typing by sex is a pervasive societal problem that affects women most harshly by confining their opportunities and chilling their aspirations, the ACLU established the ACLU Women's Rights Project to work toward the elimination of gender-based discrimination and the advancement of women's rights. The ACLU Women's Rights Project has participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth amendments.

The Chicana Service Action Center, located in Los Angeles, California, is an advocate for the rights of Spanish-surnamed women in employment opportunities, career development, and higher education. It is committed to affirmative action to enable the doubly oppressed women who receive

neither equal pay for equal work nor equal employment in skilled crafts, administration and management.

The Creative Employment Project is an employment program in Louisville, Kentucky serving persons who are seeking non-traditional jobs and persons who are re-entering the labor force after a period of absence. It has offered vocational counseling; orientation, fitness and vocational training; and job development and job placement to approximately one thousand persons, primarily women; about half of its trainees have entered employment, hundreds in jobs that had previously been non-traditional for women. It presently operates a new apprenticeship and construction outreach program for women.

Equal Rights Advocates, Inc. is a public-interest law firm in San Francisco dedicated to the litigation of issues affecting women's rights. The great majority

of its cases involve issues of employment discrimination, especially in blue-collar nontraditional jobs.

Federally Employed Women is a nationwide organization with approximately 200 chapters. Its purpose is to take action to end sex discrimination in employment in the government service; to improve the merit system in the government service; and to increase job opportunities for women in government. It has run educational programs on affirmative action for both employees and employers, and has had direct contact with federal agencies in reviewing their affirmative action plans.

The Federally Employed Women's Legal and Education Fund is a nonprofit corporation formed for the purpose of eliminating discrimination in government employment, and defending human and civil rights. It regularly enters into proceedings where

the legal issues raise a question of opportunities for advancement in employment, particularly government employment, if unlawful discrimination is involved.

The League of Women Voters of the United States (LWVUS), is a nonpartisan, tax-exempt, nonprofit membership corporation with a current membership of 131,000 in 1,350 state and local Leagues. Since its inception in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government, and believes, among other things, that no person or group should suffer legal, economic or administrative discrimination, and that responsible government should be responsive to the will of the people.

The National Association of Black Women Attorneys, Inc. was formed in 1972 to increase the percentage of black women

in the administration of justice. Black women attorneys comprise a miniscule proportion of all lawyers in the United States. Its membership knows from firsthand experience that, because of the pervasive nature of racial and sexual discrimination in our society, the economic position of black women cannot be improved without voluntary affirmative action.

The National Conference of Puerto Rican Women, Inc. is a nonprofit, nonpartisan organization with chapters in seven cities and a membership of approximately 50,000. Its purpose is to attain equal rights for Puerto Rican and other Hispanic women in the United States, and to achieve their more equitable participation in the economic, social and political life of the United States. Its principal activities include the identification and development of women leaders; the establishment of lines of communication among Puertoriquenas devoted

to eradicating discrimination; and the development of programs on behalf of Puerto Rican women.

The National Federation of Business and Professional Women's Clubs, Inc. represents about 165,000 employed women in each Congressional District, the District of Columbia, the Virgin Islands, and Puerto Rico. As an organization whose main purpose is to elevate the standards for and to promote the interests of business and professional women, it works to secure equal treatment for women in all sectors of employment.

The National Organization for Women (NOW), is a national membership organization of women and men the purpose of which is to bring women into full participation in every aspect of American society. NOW has a membership of approximately 102,000, with 657 chapters throughout the United States.

Founded in 1965, it has been continuously involved in advancing the cause of equal employment opportunity.

The NOW Legal Defense and Education Fund is a nonprofit civil rights organization established in 1971, by leaders of the National Organization for Women, to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. The NOWLDEF has participated in numerous cases to secure enforcement of legal provisions barring employment discrimination.

National Women's Employment Project is a consortium of five working women's groups: Nine to Five in Boston, Cleveland Women Working, Dayton Women Working, Women Office Workers in New York, and Women Organized for Employment in San Francisco. N.W.E.P. and its member groups are committed

to ending discrimination in employment and improving working conditions for the fifteen million women working in offices in the United States.

The National Women's Political Caucus is a multipartisan organization. Its purpose is to obtain equal representation for women in government, and fundamental to that objective is the attainment of full economic equality for women. Only with economic equality will women be able to participate fully in the political process, and a commitment to economic justice is the priority for most women in public life. Voluntary affirmative action projects provide one of the most important mechanisms for securing equal economic opportunity that women have.

The Organization of Chinese American Women has over 1,000 members in 16 chapters throughout the United States. The organization's purpose is to integrate Chinese

American women into the mainstream of women's activities and programs, especially in employment; important to that objective is the elimination of stereotypes of Chinese Americans, racial discrimination and restrictive traditional beliefs. Through its programs, which include compilation of a talent bank of Chinese American women, assertiveness training and bilingual and bicultural training for Asian women, and a project to assist Asian women to achieve policy-making positions, the Organization has found that employed Chinese American women are especially affected by affirmative action, because they are concentrated in low-paying jobs in garment factories, restaurants, and clerical positions.

60 Words Per Minute is an organization of women office workers in Washington, D.C. Office workers are the largest occupational group in Washington, D.C. 60 WPM seeks to assure through action and education that

office workers receive the wages, respect and career opportunities their work deserves.

Skilled Jobs for Women, Inc., is a nonprofit career development and comprehensive employment service for women in Southern Wisconsin. The organization achieves a 60% employment placement rate for the women it serves, who are low income, unemployed, displaced homemakers, minorities, have multiple barriers to employment, or are seeking nontraditional blue-collar jobs and apprenticeships. Our efforts in the last three years to prepare and place women in nontraditional blue-collar jobs and apprenticeships have only been possible through labor and management cooperation in actively maintaining affirmative action recruitment and selection programs.

Wider Opportunities for Women, Inc. is an independent, nonprofit, tax-exempt organization which since 1964 has worked

to expand employment opportunities for women. During the past 15 years, WOW has provided job counseling, development, referral and training for thousands of women and hundreds of employers. WOW programs have created innovative ways to increase work opportunities for women, including special programs for disadvantaged women, ex-offenders, older women, high school girls, and handicapped women. WOW also conducts a national program linking over 80 women's employment organization throughout the country for increased advocacy on women's employment issues.

Women Employed is a Chicago-based organization of women office workers of over 500 members. To achieve meaningful employment opportunity for women, it provides educational and advocacy services to its members. Women employed has studied women's exclusion from high-level employment in the banking and insurance industries, and

five years of experience processing individual and class complaints before the Equal Employment Opportunity Commission and Office of Federal Contract Compliance.

The Women in Apprenticeship Program, Inc. is a nonprofit organization in the San Francisco area which focuses on assisting women who are interested in apprenticeship programs or wish otherwise to qualify for work in blue-collar jobs. For six years, it has assisted hundreds of women to gain access to apprenticeship and non-traditional employment.

The Women in Construction Project (WICP), is a Massachusetts-based, union-sponsored program of pre-apprenticeship skills training for women. Working with trade unions and contractors, WICP during the past year has trained and placed over 45 women in entry-level construction jobs as apprentice carpenters, electricians,

painters and plumbers. WICP's success in placing women in nontraditional jobs was due in great part to a cooperative effort between employer groups and WICP, and employers' support of the WICP program and its goals.

Women Working in Construction is a local, Washington, D.C. organization. In supporting women's efforts to find work in the construction field, it has sought to, and has secured, the legal enforcement of equal employment opportunity for women.

The Women's Division of R.T.P. [Recruitment and Training Program], Inc., of New York City, recruits, counsels and places minority women into nontraditional blue and white collar occupations. Since the inception of its blue-collar component ("Women in Apprenticeship") in 1975 and its white-collar component ("Minority Women Employment Program") in 1972, R.T.P. has

successfully placed approximately 3500 women into well-paying career-oriented positions within construction and other private industries.

Women's Equity Action League is a nonprofit nationwide membership organization incorporated under the laws of Ohio with national offices in the District of Columbia. Established in 1968, WEAL seeks to promote greater economic progress for women, to press for full enforcement of antidiscrimination laws on behalf of women, and to seek correction of de facto discrimination. WEAL has pursued these goals through litigation, through monitoring the enforcement activities of federal and state agencies, and through research and dissemination of information.

The Women's Equity Action League Educational and Legal Defense Fund is a nonprofit, tax-exempt association organized

to provide legal assistance and services to ensure the full participation and recognition of individuals in all facets of American life without discrimination based on sex.

Women's International League for Peace and Freedom was founded in 1915 by Jane Addams with the express purpose of maintaining peace and justice throughout the world. It is a nonprofit organization with over 10,000 members and 100 branches in the United States. It has been actively involved in the civil rights and women's rights movements since its inception.

The YWCA Women's Trade Center of Bellingham, Washington, assists economically disadvantaged, unemployed or under-employed women so that they will be able to obtain the higher paying jobs that are traditionally open only to men. The Trade Center acts as a direct referral source for training

and placement of women. In the two years that the Women's Trade Center has been in operation over 400 women have been counseled.

* * * *

Because of the extraordinary interest in the issues presented in this case, a large number of amicus briefs have been filed. The following statement of principles will apprise the Court of the mutual support of many amici for the following basic positions in defense of the affirmative action program in controversy in the present case:

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the antidiscrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns

of underrepresentation and inequality in the workforce.

3. As stated by the EEOC, the lead agency for equal employment opportunity enforcement, in its Affirmative Action Guidelines, a major purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action."

4. Title VII and Executive Order 11246, as amended, should not focus solely on proven violations of the law; on the contrary, national antidiscrimination policy addresses current unequal conditions and provides mechanisms for their elimination.

5. We know that the remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing the pervasive patterns of discrimination addressed by Title VII and Executive Order 11246. But this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that in many instances "employment tools which recognize the race, sex or national origin of applicants and employees" (see EEOC Affirmative Action Guidelines) such as those at issue in this case are presently the only effective means by which true equal opportunity can be achieved.

8. Our endorsement of voluntary affirmative action in no way diminishes our support for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVOCATES FOR WOMEN, et al., Plaintiffs, v. F. RAY MARSHALL, et al., Defendants.	Civil Action Number 76-0862 (Judge Corcoran)

AFFIDAVIT OF JOHN M. HENEGHAN

District of Columbia) ss

1. My name is John M. Heneghan. I am the Director of the Office of Civil Rights, Maritime Administration, U.S. Department of Commerce. I have held this position since August of 1968. This office is responsible for the enforcement of Executive Order 11246, as amended by Executive Order 11375 (The Executive Order). We have jurisdiction over the shipbuilding

and ship repair industry as well as the shipping industry in the coastal states of the United States.

2. Before coming to this agency I was Deputy Regional Director of the Equal Employment Opportunity Commission in the Atlanta Region. Prior to that I was responsible for the contract compliance program under Executive Order 10925 (predecessor to current Executive Orders in the field of contract compliance) for the Navy Department in the Southeast Region. Before coming to government I had twelve years of general experience in the field of industrial relations. My experience in dealing with the shipbuilding industry dates back to 1964 when I first conducted a compliance review of the Ingalls Shipbuilding facility in Pascagoula, Mississippi.

3. The shipbuilding industry in the post World War II period had been a predominantly male industry, particularly in the blue-collar trades. The shipbuilding industry is akin to the construction industry inasmuch as the workforce is divided along craft lines.

* * *

5. My early dealings with discrimination in the industry were limited to racial and ethnic discrimination. Under the Executive Order we did not have the authority to deal with sex discrimination until 1968. Between the period 1968 thru December 1971 the rules and regulations of the Department of Labor under which we operated did not explicitly state that goals and timetables should be obtained by sex. In this early period prior to December 1971 we had very few complaints from women with

respect to blue-collar employment opportunities in the industry.

6. In this early period management resisted the idea of bringing women into the shipbuilding industry. There was concern about the expense of building or renovating toilet and locker facilities. Concern was also expressed about the heavy physical nature of the work and the physique of women. There also was concern about the uncertain numbers of women that would apply if facilities were available.

7. Nationally, there were 221 women employed in the blue-collar occupations in the industry in 1971. This represented .3% of the blue-collar workers in the industry. In early 1972 we began requiring the contractors under our jurisdiction to have goals and timetables for women in all blue-collar occupations. This requirement

was based on amended Office of Federal Contract Compliance regulations that applied the same standards for goals and timetables to women as was required for racial/ethnic groups. By early 1976 there were 4,223 women in the blue-collar occupations accounting for 4.7% of all these positions. The earlier concerns of industry proved to be ungrounded once women were actively recruited. An interesting side effect of introducing women in the workforce was a decrease in turnover. This has been a perennial problem in the industry and women have been more stable workers in shipyard occupations.

8. When we first approached contracts for goals and timetables in shipyard jobs we had no guidelines as to setting numbers. As a rough rule-of-thumb we chose a figure of 50% of the participation rate of women in the labor market as a goal for beginning

jobs. Thus in a labor market that had 40% female participation we suggested a goal of 20% for entry level jobs. No goals were set for advanced blue-collar jobs. Once a certain number of women had been employed, we established goals for their promotion into the advanced blue-collar jobs.

9. Initially there was concern on the part of management with respect to the novelty of women in these non-traditional jobs. We encouraged management to bring in a large number of women at a time to diffuse the novelty and decrease the tensions that would apply to isolated women. Hiring women in large numbers did prove to be a successful technique.

10. One of the larger, more dramatic increases in female participation took place in the Ingalls Pascagoula yard where the number of blue-collar women increased from

89 in 1971 to 2,128 in 1977 and yet prior to 1971 there were no complaints of sex discrimination nor female applicants for the shipyard jobs. One phenomenon that we have noted is that as more women are employed a snow-ball effect is observed in the applicant flow of women. In our earliest efforts we only expected an applicant flow of less than half of the normal female participation rate in a labor market. At the present time the applicant flow into the Ingalls Pascagoula yard is running at the normal participation rate of women in that labor market.

* * *

Further the affiant saith not

s/John M. Heneghan
John M. Heneghan

Sworn to and subscribed
before me this 4th
day of February, 1977.

s/Anne E. Manning
Notary Public

My commission expires:

April 14, 1979

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

KAISER ALUMINUM & CHEMICAL CORPORATION,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE

AMERICAN G.I. FORUM, INCORPORATED MEXICAN AMERICAN GOVERNMENT EMPLOYEES, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, S.E.R.-JOBS FOR PROGRESS, INC.

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In the Supreme Court

Of The

United States

OCTOBER TERM, 1978

Nos. 78-435, 78-432 and 78-436

KAISER ALUMINUM &
CHEMICAL CORPORATION, et al.,

Petitioners,

vs.

BRIAN F. WEBER, et al.,

Respondents.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE[1]

The American G.I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic and political practices that pervaded this country. The organization now has chapters nationwide. One of the main goals of the Forum is the improvement of employment opportunity.

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[1] Because of the extraordinary interest in the issues presented in this case, a large number of amicus briefs have been filed. The statement of principles set forth in Appendix A. will apprise the Court of the mutual support of many amici for a number of basic positions in defense of the affirmative action program in controversy in the present case. Amici's interest in this case is magnified by recent studies revealing the government's unkept promise to protect the equal employment opportunities of hispanics. Between 1060 and 1976 the degree
(cont. next page)

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 24 states, IMAGE is incorporated in the District of Columbia.

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1 (cont. from last page)
of occupational segregation for Mexican American males and females actually became worse. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August 1978), pp. 40-46. In December, 1977 the Commission reported, "...drastic measures are clearly needed if EEOC is ever to become an agency which effectively combats employment discrimination..." United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1977, To Eliminate Employment Discrimination - A Sequel (1977), p. 177. See also United States Commission on Civil Rights, The Challenge Ahead, Equal Opportunity in Referral Unions (May 1976).

IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state, and local employment. For example, although Hispanic Americans comprise over 7% of the national population, they hold only 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. Its 50th anniversary year, 1978, was spent continuing the development of an equitable share of job opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

SER-Jobs for Progress, Inc., (SER), is a nonprofit Texas corporation which has been

providing employment and training services to economically disadvantaged Hispanics throughout the United States for the past decade. National SER is providing $2.7 million in training and technical assistance to some sixty local SER/CETA program service deliverers. There are several local SER program operators that provide employment and training services to economically disadvantaged unemployed residents.

QUESTIONS PRESENTED

1. May a Private Employer and a Labor Organization Voluntarily Take Affirmative Action to Bring Minorities Into a Workforce From Which They Are Absent?

2. Does the Trial Record Provide a Reasonable Basis for the Affirmative Action Plan?

3. Should the Case be Remanded for Further Development of the Record on the Issue

of Prior Discrimination?

STATEMENT OF THE CASE

Amici defer to Petitioners to describe the factual setting of this case with the exception of the substantial evidence of prior discrimination which was not developed by any party, as set forth in Section I.

ARGUMENT

Amici curiae respectfully urge that the decision below be reversed or remanded. A reasonable reading of Executive Order 11246 and Title VII,[2] the legislative and administrative history, and the relevant case law fully support the legality of the affirmative action plan. Furthermore, the reasonableness of the

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[2] 42 U.S.C. §2000(e)(2) et seq.

plan is abundantly supported by the factual circumstances from which it arose.

The first question presented in this case is whether a private employer and labor organization may voluntarily undertake affirmative action to bring minorities into a workforce from which they are absent. Amici disagree with the trial court, the Fifth Circuit Court of Appeals and Respondents herein. They assert that a permissible affirmative action plan would have aided only identifiable victims of discrimination and would be justified only upon a showing of prior discrimination by Kaiser's Gramercy plant. Furthermore, they contendthat race conscious affirmative action plans can be instituted only by the courts or the Executive Branch, and never by a private employer. Such restrictions are inconsistent with the provisions and purposes of Executive Order 11246 and Title VII.

The second question presented herein is whether the trial record contains sufficient

facts to support the legality of the affirmative action plan. Amici contend that the record contains sufficient facts upon which the necessity and reasonableness of the plan can be based. A judicial finding to this effect should have been made.

The third question is whether in the absence of a reversal the case should be remanded for further development of the record on the issue of prior discrimination. The trial court could invite the government and/or appropriate private parties with an interest in fully exploring this issue to intervene in the trial or it could appoint a master and/or employ an independent expert to investigate and report on the issue of prior discrimination.

I. THE PROPER STANDARD FOR DETERMINING THE VALIDITY OF A VOLUNTARY AFFIRMATIVE ACTION PLAN UNDER TITLE VII OR

EXECUTIVE ORDER 11246 IS WHETHER THE PLAN "REPRESENTS THE ONLY RATIONAL, NONARBITRARY MEANS OF ERADICATING PAST EVILS".

In NAACP v. Allen, 493 F.2d 614 (1974), the Fifth Circuit Court of Appeals observed,

> "It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils." 493 F.2d at 619.

The "past evils" in the present case are apparent from the record itself. In addition to the statistics at the Gramercy plant and its history of unfavorable Office of Federal Contract Compliance Programs (OFCCP) reviews,[3]

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[3]Trial Transcript, pp. 77, 85.

the testimony of Kaiser's Director of Equal Opportunity Affairs, Thomas M. Bouble, attests to the nation's legacy of unconstitutional racial discrimination:

> "I don't think there is any employer in the United States prior to a given time in our history, that didn't practice employment discrimination in some form." Trial Transcript, p. 125.

Mr. Bouble also expressed his opinion why minorities historically have suffered exclusion from the skilled trades:

> "My personal opinion is, it's a direct result of employment discrimination over the years, the lack of opportunity on the part of the blacks in some areas of the community, Mexican-Americans certainly, women, to obtain the kind of training that was necessary to achieve the skills." Trial Transcript, p. 98.

The necessity of the affirmative action plan, and its reasonableness, also can be inferred from the testimony of Dennis E. English, Kaiser's Industrial Relations Superintendent. When asked if he knew of any other means

available, Mr. English replied, "I don't." Trial Transcript, p. 60.

The reasonableness of the plan is further evidenced by the fact that it increases, rather than decreases, all Kaiser employees' rights, and the duration of the plan is limited to three years (the length of the collective bargaining agreement) or the achievement of approximately proportional representation of qualified minorities in the craft trades. Trial Transcript, pp. 52, 64. Striking down the plan would lead to the absurd result of perpetuating a nearly 100% white craft department at the Gramercy plant in the name of equal opportunity.[4]

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[4] It was stipulated at trial that a strict seniority system for selection of craft trainees would have resulted in the selection of 100% whites, rather than 4 whites and 5 blacks, in the first 9 positions filled under the affirmative action plan. All of the first thirteen openings except one would have been filled by whites if strict seniority were followed. Trial Stipulation (Joint
(cont. next page)

Amici submit, on the basis of more than 100 years of combined organizational experience in the struggle to defend equal opportunities for hispanics, that affirmative action plans such as that in contoversy here are the only rational, nonarbitrary means of eradicating past discrimination for millions of minorities and women across the nation.

The Court today is called upon to apply to the arena of employment relations the same principles which it has applied in other areas of national concern. It has been widely recognized that the "Constitution is both color blind

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4 (con't. from last page)
ExhibitA), Trial Transcript, pp. 197-198. Furthermore, the importance of each trainee slot to the affirmative action program is emphasized by the fact that these slots are created based upon the company's needs: "What we attempt to do is forecast the positive needs that we think we're going to have...I don't think, personally, that we're going to be looking at a group of trainees, at any time in the near future, of more than 20 trainees at once. We don't have any trainees for 1975." Trial
(cont. next page)

and color conscious." United States v. Jefferson County School Board, 372 F.2d 836, 876 (5th Cir. 1966), aff'd on rehearing en banc, 380 F.2d 385, cert. denied sub nom. Caddo, Parish School Board v. United States, 389 U.S. 840 (1967). It is the color conscious aspect of the Constitution which permits the courts to approve voluntary affirmative action plans under appropriate circumstances. Federal Courts of Appeals repeatedly have upheld race conscious remedies. Morrow v. Dillard, 18 FEP Cases 119 (5th Cir. 1978); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976), aff'd 556 F.2d 167 (3rd Cir. 1977), cert. denied, 98 S.Ct. 3145 (1978). Title VII and Executive Order 11246

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4 (cont. from last page) Transcript, pp. 63-64. As for the length of time needed to achieve the desired results of the affirmative action plan, witness English testified, "I'm guessing it could probably be a minimum of ten years, to a maximum of maybe never, depending upon our needs..." Trial Transcript, p. 64.

are even more explicity color conscious. 42 U.S.C. §2000(e)(2)(j); 41 C.F.R. §60 -1.40(a), 2.10-2.13.

On December 8, 1978, the Equal Employment Opportunity Commission (EEOC) voted to approve new Guidelines on Affirmative Action[5] which reaffirm the government's commitment to the type of affirmative action program under attack today and, Amici contend, implement the standard enunciated in NAACP v. Allen, supra. The EEOC approved the guidelines,

> "to prevent liability from claims of so-called 'reverse discrimination' and to promote voluntary action to increase employment opportunities for minorities and women without infringing on the rights of others." EEOC Press Release (December 11, 1978) p. 1.

Eleanor Holmes Norton, Chair of the EEOC, said upon releasing the guidelines that Regents of the University of California v. Bakke,

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[5] 29 C.F.R. §1608.1, et seq.

98 S.Ct. 2733 (1978) and Weber v. Kaiser Aluminum Corp., 563 F.2d 216 (5th Cir. 1977) demonstrate "the need for government guidance" and observed that,

> "It is fundamentally unfair to put an employer in a position where he is at risk if he tried to bring himself into compliance and at risk if he does not. Neither Congress nor the Courts could have intended so irrational a result." Press Statement, Eleanor Holmes Norton (December 11, 1978), p. 2.

Hence, the contention of Amici that Congress did not intend to invalidate voluntary programs such as the instant plan when it enacted Title VII, §§703(a), (d), (h) and (j) of the Equal Employment Opportunity Act.[6] Moreover, it should be recalled that the guidelines do not contain new or novel legal notions, but rather were written to clarify these issues so as "to eliminate confusion and encourage voluntary action and compliance that the statute envisions."

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[6] 42 U.S.C. §§ 2000(e)(2)(a), (d), (h) and (j).

Press Statement, supra, p. 1. Thus, it is appropriate for the court to hold that the guidelines issued on December 11, 1978 should, in fact, be the standard applied to determine the validity of the affirmative action plan in controversy. Amici respectfully submit that the case should be remanded to the District Court to give appellants an opportunity to comply with the formal requirements of the guidelines so that the Court can then determine if the affirmative action plan is protected under §713 (b)(1)[7] and 29 C.F.R. §1610(b).

While it is true that the new guidelines postdate the 1974 Labor Agreement, this Court has previously given similar consideration to revised EEOC guidelines and has consistently held that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." Griggs v. Duke Power Co.,

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[7] 42 U.S.C. §2000 (e)(12)(b)

401 U.S. 424, 433-434 (1971).[8] Also, the basic judicial duty to avoid constitutional decision is well established. Rescue Army v. Municipal Court, 331 U.S. 549, 572, n. 38 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). A remand also would permit the District Court to hear additional evidence on the assessment by OFCCP of Kaiser's employment practices regarding prior discrimination and the need for the present plan in order to comply with OFCCP standards. Under the guidelines, the EEOC recognizes,

> "...that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity

[8] Griggs concerned job requirements initiated by Duke Power Company between 1955 and 1965, whereas the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §1607, considered by the court in Griggs were revised on August 1, 1970, seven months prior to the court's decision on March 8, 1971.

> with Executive Order No. 11246." EEOC, Supplementary Information: An Overview of the Guidelines on Affirmative Action (December 8, 1978), p. 10.

A. A VOLUNTARY AFFIRMATIVE ACTION PLAN'S REMEDIAL PREFERENCE TO UNIDENTIFIED MINORITIES DOES NOT INVALIDATE THE PLAN.

The decision below cites Franks v. Bowman Transportation Co., 424 U.S. 747, 781 (1976) (Burger, C.J. dissenting) for the proposition that the affirmative action plan "robs Peter to pay Paul." This reliance is misplaced in that Franks concerned a lawsuit brought by specific individuals and a defined class of individuals alleging discrimination against them during a specified period of time. The present case does not involve a lawsuit attempting to recapture wrongfully denied seniority rights. Rather, the controversy

involves the specific means by which minorities grossly underrepresented in the company's craft positions, are to be given the opportunity to fill craft positions on an equal footing with whites. The specific issue is one of first impression for this Court. Weber, supra, at 230 (Wisdom, dissenting).

The concept and purposes of seniority systems have been considered recently on several occasions by this and other courts. Franks, supra; United Air Lines v. Evans, 431 U.S. 553 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The Ninth Circuit Court of Appeals in recent weeks had occasion to distinguish between a seniority system and a provision which was "not part of a seniority system." Bryant v. California Brewers, 595 F.2d 426 (1978). Amici contend that the affirmative action plan is not part of a seniority system and should not be measured by the standards applicable to

seniority systems cases. Indeed, Mr. Weber does not contend that the relevant section of Title VII controlling seniority systems, §703 (h),[9] was violated by the affirmative action plan.

Furthermore, no reasonable expectations of white employees were disturbed by the affirmative action plan. Prior to the 1974 Labor Agreement, substantially all maintenance and craft personnel employed at Kaiser's Gramercy plant were obtained by the hire of persons qualified and trained in such crafts prior to employment at Kaiser. Trial Transcript, p. 196[10]

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[9] 42 U.S.C. §2000(e)(2)(h)

[10] The devastating effect of this requirement on minorities is reflected by the fact that until the implementation of the 1974 Labor Agreement, approximately 98% of all craft employees were white, as compared with a labor force which was 39% black and a community that was 46% black. Trial Transcript pp. 50, 54.

This excluded the majority of Kaiser's work force, including persons such as Mr. Weber with relatively little experience and training. Thus, the implementation of the new selection procedures expanded, rather than restricted, the employment opportunities of white, minority and women employees.[11] Indeed, a training program exclusively for blacks was held by the Fifth Circuit of Appeals to be proper where they had been disproportionately excluded from craft positions in the past:

> "Of the more than three hundred craft positions, only three are filled by black employees - and these are recent enrollees in the four-year apprenticeship program. The implications under Title VII are obvious. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971)." Buckner v. Goodyear Tire and Rubber Co., 339 F. Supp. 1108, 1122 (N.D. Ala. 1972), aff'd without opinion, 476 F.2d 1287 (5th Cir. 1973).

The remedy ordered by the Fifth Circuit Court

[11] Trial Transcript, pp. 60-62

of Appeals in Buckner included the following:

> "The company is to provide, at its cost, pre-apprenticeship academic training for 20 black applicants each year through a selected course of study conducted at a local educational institution and directly related to the entrance requirement of its apprenticeship program...Selection of participants will be done by Goodyear after direct contact with appropriate leaders of the black community, provided however preference shall be given to blacks presently employed by Goodyear." 339 F. Supp. at 1124-1125.

Thus, no requirement was imposed that the beneficiaries of the court-ordered relief be "identifiable" victims of discrimination as the court below would require.

The Buckner relief also included a one-to-one ration for blacks and whites admitted to Goodyear's Apprenticeship Program

> "until such time that the percentage of blacks in the craft jobs (including the apprenticeship program) is at least three-fourths of the percentage of blacks in the production jobs...[12]

[12] Buckner, supra, at 1125. The trial court (cont. next page)

Unlike Regents of the University of California v. Bakke, supra, the present case does not involve preferences awarded to minorities "less qualified" than whites for the positions in question. Trial Transcript, pp. 39-40. Also, the craft training program at issue does not exclude whites. On the contrary, it creates craft opportunities for both white and minority Kaiser employees which they did not have before. The Bakke court, in applying the compelling state interest test to determine if Mr. Bakke's Fourteenth Amendment rights had been violated, noted that "The employment discrimination cases also do not advance petitioner's cause." 1198 S.Ct. at 2754.

B. THE FAILURE OF BOTH THE COMPANY AND THE UNION TO ADMIT OR ESTABLISH PRIOR DISCRIMINATION ON THEIR PART DOES NOT INVALIDATE THE PLAN.

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court called upon employers

> "...to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in his country's history. 422 U.S. at 418.

See also Griggs, supra, at 432. Clearly, it was the intention of Congress in enacting Title VII to relieve the country of this historical burden as quickly as possible, and not to rely exclusively upon court actions. The desperate cry of the sixties for equal opportunity could not be harmonized with the cautious wheels of courtroom justice. Thus, the permissive language of §703(j):[13] "...nothing contained in this subchapter shall be interpreted to require any employer...to grant

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[13] 42 U.S.C. §2000(e)(2)(j)

preferential treatment..." (emphasis added) The new guidelines implement this permissive standard, allowing employers to exercise their own discretion regarding the need for an affirmative action program. And there is no requirement that the employer admit or establish a violation of Title VII as a prerequisite to implementing an affirmative action plan:

> "It is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action." 29 C.F.R. §1608(b).

C. EVIDENCE OF DISCRIMINATION BY PERSONS OR INSTITUTIONS OTHER THAN THE EMPLOYER IS RELEVANT TO DETERMINE THE PROPRIETY OF A RACE CONSCIOUS AFFIRMATIVE ACTION PLAN.

The broad purpose of Congress in the enactment of Title VII is plain from the language of the statute: to achieve equality of employment opportunities and remove barriers that have operated in the past to favor white employees over other employees. Griggs, supra, at 429-420. The thrust of the Act is the consequences of past discrimination, not the particular offending party or his motivation. Griggs, supra, at 432. Amici contend that the complex and continuing history of racial discrimination in this country[14] defies simple distinctions between societal and individual discrimination. This was recognized by the EEOC in its refusal to rigidly define a method of self-analysis for employers: "There is no mandatory method of conducting a self-analysis." 29 C.F.R. §1608.4(a). More specifically, the guidelines advise employers to be concerned,

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[14] see n. 1, supra.

> "...with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions." 29 C.F.R. §1608.4(a).

Amici submit that this language, the court decisions cited herein, the new guidelines and common sense lead to the inescapable conclusion that the societal versus individual discrimination dichotomy should no longer have a place in the enforcement of our equal employment laws. It is unrealistic to exclude evidence of discrimination by persons or institutions other than the employer in assessing the validity of a race conscious voluntary affirmative action plan. Weber, supra, at 235 (Wisdom, dissenting). In addition, as explained in amici's brief requesting a writ of certiorari herein, the Thirteenth Amendment is aimed at the abolition of all "badges and incidents" of slavery, including the concept of white supremacy, and does not make a distinction between societal and individual

discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-443 (1968); Runyon v. McCrary, 427 U.S. 160 (1976). See generally Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967).

II. THE TRIAL RECORD PROVIDES A REASONABLE BASIS FOR THE AFFIRMATIVE ACTION PLAN.

While amici contend that prior discrimination by the employer is not a requirement for race conscious voluntary affirmative action, evidence of prior discrimination is relevant in evaluating the reasonableness of the affirmative action program actually implemented. Amici submit that the Gramercy plan was lawful and reasonable based upon the history of exclusion of minorities and women from craft positions, the failure on the part of the employer and union to validate the experience

requirements which adversely affected minorities and women, the absence of invidious or stigmatizing discrimination against whites as a result of the plan, and the reasonableness of the terms of the plan, as discussed above.[15] The trial court's failure to take cognizance of the substantial evidence of prior discrimination at the Gramercy plant proved to be a fatal flaw in reaching a proper conclusion either under the Respondents' standard, requiring such prior discrimination, or Petitioners' standard, which would consider prior discrimination by the

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[15] In addition to the company's reasonable creation of craft employment opportunities for minorities and women, the union has a duty to represent all employees in a bargaining unit without discrimination. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). Here, the employer and the United Steelworkers union had a mutual interest to be served by the affirmative action plan. The plan "strikes a balance in apportioning future expectations among innocent and competing parties..." U.S. v. Lee Way Motor Freight, Inc., 15 FEP Cases 1385, 1404 (W.D. Okla. 1977).

employer as one factor in assessing the reasonableness of the affirmative action plan. Even without OFFCCP records, there was substantial uncontroverted testimony at trial revealing noncompliance with OFCCP standards.[16] In light of this evidence, the burden shifted to plaintiff to show the absence of prior discrimination. Weber, supra, at 236 (Wisdom dissenting).

As for prior discrimination by Gramercy against minorities in violation of Title VII, the uncontroverted statistical evidence discussed above points inescapably to at least a prima facie case of discrimination which was never rebutted. Weber, supra, at 231 (Wisdom,

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[16] According to witness English, implementation of the plan was a "do it or else" matter, and he noted the 1969 OFCCP compliance review after which a 50/50 hiring ratio was recommended until the "in-plant population equaled the general population in the community." Trial Transcript, pp. 77, 85. At the time of the 1974 Labor Agreement, minorities held 14.8% of all jobs at Gramercy, whereas they constituted 39% of the area's labor force. Trial Transcript, pp. 50-51.

dissenting); IBT, supra; Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973).

In the face of the above described trial record, the trial court found,

> "...no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application." Opinion of Gordon J., District Judge, Trial Transcript, p. 210.

III. IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED TO PROVIDE A COMPLETE RECORD TO DETERMINE THE VALIDITY OF THE AFFIRMATIVE ACTION PLAN.

Amici contend that no party at trial had an interest in proving prior discrimination. Weber, supra, at 231 (Wisdom, dissenting). Amici do not contend that the trial herein was collusive. Nevertheless, the same effect is produced where all parties have a similar interest in not fully exploring evidence regarding an important issue in the lawsuit, here

evidence of prior discrimination by the Gramercy plant. Mr. Weber, of course, would not produce such evidence. Clear evidence of past discrimination by Gramercy would tend to weaken his case by further justifying the affirmative action plan. Neither the employer nor the union would volunteer such evidence, obviously in order to avoid claims by minorities and women for relief under Title VII and 42 U.S.C. § 1981. U.S. v. Johnson, 319 U.S. 302 (1943) describes the public policy which was left unprotected in this lawsuit, just as occurred in Regents of the University of California v. Bakke, supra, where the absence of minority participants at trial contributed to an incomplete record on the issue of past discrimination at the University of California. In Johnson the Court noted the "absence of a genuine adversary issue between the parties" and warned that the trial court under such circumstances,

> "may not safely proceed to judgement, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." 319 U.S. at 304.

Amici contend that the trial court could have insured the integrity of the judicial process under these circumstances either by inviting the government and/or appropriate private parties with an interest in fully exploring this issue to intervene in the trial, or by appointing a master[17] and/or independent expert to investigate and report on the issue of prior discrimination.[18]

CONCLUSION

The proper standard to determine the validity of the affirmative action plan is set

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[17] Fed. Rules Civ. Proc. Rule 53; Hackley v. Roudebush, 520 F.2d 108, 153 (1975).

[18] Fed. Rules Evidence Rule 706.

forth in the EEOC's Guidelines on Affirmative Action. These guidelines implement and refine the reasonableness test which would uphold any affirmative action plan that represents the "only rational, nonarbitrary means of eradicating past evils." The cases cited herein, along with the EEOC's analysis of the issues confronted in the guidelines, show the errors inherent in the standards applied by the Fifth Circuit Court of Appeals. Furthermore, the trial record contains sufficient facts to support both the necessity and reasonableness of the affirmative action plan. The case, therefore, should be reversed or remanded to permit Petitioners to comply with the formal requirements of the Guidelines on Affirmative Action. Regardless of whether the Court finds the EEOC's new guidelines applicable, the case should be remanded for further development of the record on the issue of prior discrimination Specifically, if there is no judicial finding of

prior discrimination, the trial court should either invite the government and/or private parties to intervene, or appoint a master and/or independent expert in order to fully develop the record on the question of prior discrimination.

Respectfully submitted,

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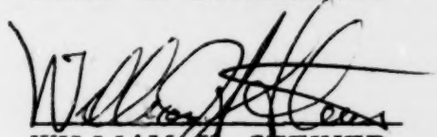

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APPENDIX A

APPENDIX A

STATEMENT OF PRINCIPLES

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As explained by the EEOC in its "Guidelines on Affirmative Action", which as a result of Executive Order 12067 state the position of the Executive Branch: "Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace...Voluntary Affirmative Action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII."

4. Title VII and the anti-discrimination principle should not exclusively be a search for villains and villainous acts; on the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. The remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing pervasive patterns of discrimination addressed by Title VII and Executive Order 11246. But this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that in many instances "appropriate employment tools which recognize the race, sex or national origin of applicants and employees" (EEOC Affirmative Action Guidelines) such as those at issue in this case are presently the only effective means by which true equal opportunity can be achieved.

8. Endorsement of voluntary affirmative action in no way diminishes the need for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

The above statement has been endorsed by numerous organizations and labor unions, including, among others, District 1199, National Union of Hospital and Health Care Employees, AFL-CIO, United Electrical, Radio and Machine Workers of America and the Affirmative Action Coordinating Center (AACC). AACC is an organization created by the National Conference of Black Lawyers, (NCBL), the Center for Constitutional Rights, (CCR) and the National Lawyers Guild (NLG) with participation by a cooperating network of civil rights, civil liberties, and other organizations.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, et al., *Petitioners*,

v.

BRIAN F. WEBER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE

For:

American Federation of State, County and Municipal Employees, AFL-CIO
International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC
International Union of Oil, Chemical and Atomic Workers, AFL-CIO
International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW)
International Woodworkers of America, AFL-CIO, CLC
National Education Association
United Farm Workers of America, AFL-CIO
United Mine Workers of America
Coalition of Black Trade Unionists
Coalition of Labor Union Women

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(*listing continued inside cover*)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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International Woodworkers of America, AFL-CIO, CLC
National Education Association
United Farm Workers of America, AFL-CIO
United Mine Workers of America
Coalition of Black Trade Unionists
Coalition of Labor Union Women

INTEREST OF AMICI

Amici are ten international and national labor organizations committed to the elimination of employment dis-

crimination against minorities and women and to the eradication of its continuing effects. *Amici* believe that remedial plans such as that challenged by respondent in this case are necessary, appropriate and lawful action towards these ends.

The American Federation of State, County and Municipal Employees is the largest labor organization in the AFL-CIO, with a membership of more than one million persons, most of whom are employed by state and local governments throughout the nation. Of this total membership, substantial numbers are minorities and/or women. AFSCME is committed to the principle of affirmative action as a means of achieving equal opportunity in employment, and has therefore participated in previous briefs *amici curiae* in this Court in cases raising related issues.

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (IUE) has over 285,000 members throughout the Nation, 100,000 of whom are women, and many of whom are members of disadvantaged minority groups. The IUE is a leader among unions in championing the civil rights of its members. It has instituted numerous suits under federal and state fair employment laws, and has filed many charges of discrimination with administrative agencies. The IUE believes that affirmative action is an indispensable tool toward the elimination of the legacy of discrimination.

The International Union of Oil, Chemical and Atomic Workers, AFL-CIO (OCAW) represents more than 180,000 employees in the oil, chemical, atomic and related industries. Its membership includes both sexes and all races and it has a strong commitment to the principle of equal employment opportunity. Because OCAW believes that affirmative action is essential to the achievement of this goal, it joins in this *amicus* brief.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers, and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4-1/2 million persons throughout the United States and Canada. The UAW is deeply committed to equal employment opportunity and antidiscrimination. The UAW, like the Steelworkers and other industrial unions, has long been desirous of remedying the near-total absence of minorities in the skilled trades, and of creating access to these elite jobs for incumbent, unskilled workers of all races. The UAW has negotiated major national collective bargaining agreements with provisions that expressly provide apprenticeship program admissions advantages to minorities. See *Barnett* v. *International Harvester*, 12 FEP Cases 786 (W.D. Tenn. 1976). UAW believes that the decision of the court of appeals in this case, unless reversed, will cast a pall over all voluntarily adopted affirmative action programs.

The International Woodworkers of America, AFL-CIO, CLC is a labor organization representing approximately 125,000 members. Since October, 1972 it has engaged in an extensive affirmative action program, especially in areas of concentration of black employees in the industry, as in the southern United States.

The National Education Association, founded in 1857 and chartered by a special act of Congress in 1906, is the largest organization of public employees in the nation. NEA presently has a membership of nearly 1,700,000. Many of its affiliates are labor organizations engaged in collective bargaining on behalf of teachers with school employers. NEA believes that teaching staffs and faculties

should reflect the ethnic diversity in our society and accordingly that collective bargaining contracts containing affirmative action provisions assuring such diversity should not be discouraged.

The United Farm Workers of America, AFL-CIO (UFW) is an unincorporated association which functions as a trade union on behalf of agricultural laborers. Minorities comprise a large percentage of the membership of the UFW. UFW is vitally interested in the social betterment of its members and in eliminating discrimination in job opportunities.

The United Mine Workers of America (UMWA) is a labor organization representing coal miners throughout the United States. The UMWA, by its constitution, contracts, and actions, has been in the forefront of the nation's struggle to establish equal opportunity in employment for minorities and women, and it is dedicated to securing equal opportunity in every walk of American life.

The Coalition of Black Trade Unionists (CBTU) is a national membership organization of black men and women who are members of labor unions. CBTU supports the concept of affirmative action and numerical goals to rectify discrimination in employment.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of labor unions. CLUW has thirty active chapters throughout the United States with members from more than 65 International Unions. CLUW is dedicated to the participation of women within their unions and to removing all forms of discrimination in the workplace.

CONSENT OF THE PARTIES

This brief *amici curiae* in support of petitioners is filed with the consent of all parties.

QUESTION PRESENTED

In a community with a 46% black population, in which an employer has only 5 blacks among its 290 craftsmen, does Title VII of the Civil Rights Act of 1964, as amended, invalidate a collective bargaining agreement calling for the creation of a craft training program and allocation to blacks of one half of these new opportunities for training?

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Company's Gramercy plant is located in a rural Louisiana community, with a population that is 54% white and 46% black. A. 60. Although the vast majority of the jobs in the plant do not require any specialized skills or experience, A. 78, in 1974, black employees comprised only 15% of Kaiser's work force. A. 87. A disproportionate number of these black employees were low seniority employees who had been hired in the preceding five years. A. 71, 78, 87.

The best jobs in the plant are the craft jobs. In 1974, only 5 of 290 craft jobs were filled by blacks. R. 62. Until that date, Kaiser applied requirements of up to five years of prior industrial craft experience as a condition of entry to these jobs. A. 70. At trial, company officials attributed the virtual absence of blacks among its craftsmen to the inability of blacks to acquire the prerequisite experience due to racial discrimination in the building trades. A. 63, 90. The prior industrial experience requirements had not been subjected to any validation study.[1]

The United Steelworkers of America, AFL-CIO-CLC, is

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[1] The record is silent on the issue of validation, but OFCC documents lodged with the Clerk by the Solicitor General make clear that the experience requirement had not been validated. See File Memorandum, January 31, 1973.

the collective bargaining representative of the production and maintenance employees at the Gramercy plant. For some years prior to 1974, the Steelworkers had unsuccessfully sought the institution of a craft training program, by which incumbent production employees, few of whom could meet the experience requirements, could learn the necessary skills and promote to craft jobs. A. 73.[2] The company had consistently declined to adopt such a program, because of its high cost and the availability of persons with the necessary skills outside the incumbent work force. A. 67-68.

In 1974, Kaiser and the Steelworkers resolved to take positive action to end the virtual exclusion of blacks from craft jobs. They entered into agreements which called for the establishment of craft training programs for incumbent employees, and agreed to fill the places in this program half with minorities and half with whites.[3] The company and the union agreed that the selections, within each racial group, were to be made on the basis of total employment seniority. At the time of trial, seven blacks and six whites had been admitted to the training program. A. 66. The record makes clear that the training program would not have been established by Kaiser, other than in connection with its decision to take steps that would assure the entry of blacks into craft jobs.[4]

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[2] Prior to the establishment of the 1974 training program, Kaiser had done some training of employees who had some substantial prior craft experience, but not enough to meet the established experience requirements. Two out of the 28 employees trained under these programs were black. A. 125-26.

[3] Five percent out of the "minority" fifty percent goal was allocated to women. None of the four women in the Gramercy plant workforce had bid for entry to the training program at the time of trial A. 66-67.

[4] The training program in Gramercy was only adopted after Kaiser and the Steelworkers nationally had agreed to establish temporary goals of fifty percent minority entries into craft jobs. The goal was to continue in each plant until such time as minority craftsmen equalled the minority proportion of the work force. The training program in Gramercy was established because it would not be possible to meet this goal without it. A. 137, 144-46.

Respondent Weber, a white employee at the Gramercy plant who was denied admission to the training program, brought suit claiming that the admission of black employees with less employment seniority than whites who were not admitted violated rights secured to the white workers under Title VII of the Civil Rights Act of 1964. Weber's position was sustained by the district court and by a divided court of appeals.

ARGUMENT

I. Title VII Does Not Prohibit an Employer and a Union from Adopting Reasonable Race Conscious Measures to Overcome the Absence of Minorities from Skilled Jobs.

The decision of this case depends on the interpretation of Sections 703(a), (c) and (d) of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-2(a), (c), (d), which prohibit racial and sexual discrimination in employment by employers and by labor organizations, specifically in regard to apprenticeship training. This Court has held that Title VII of the Civil Rights Act of 1964, unlike Title VI, does not embody the same standards as the Fifth or Fourteenth Amendment prohibitions against discrimination by governmental agencies, see *Washington* v. *Davis*, 426 U.S. 229 (1977), and, accordingly, no constitutional question is presented in this case. Compare *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, (opinion of Mr. Justice Powell); 2766 (opinion of Mr. Justice Brennan) (1978). We think it clear that in the enactment of Title VII, the Congress did not intend to pro-

hibit reasonable voluntary action, such as that embodied in the Kaiser-Steelworkers craft training program.

Title VII of the Civil Rights Act of 1964 was enacted in response to long standing discrimination in employment against minorities and women. Its purpose was to prohibit practices that exclude these individuals from employment opportunities, on grounds of race or sex. See generally *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

In its consideration of Title VII in 1964, Congress did not address the issue of the "reverse discrimination" that arguably results when an employer takes special affirmative steps to provide new opportunities to members of minority groups.

> There simply was no reason for Congress to consider the validity of hypothetical preferences that might be afforded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

Regents of the University of California v. *Bakke, supra*, 97 S.Ct. at 2746 (Powell, J.).[5]

This issue was, however, forcefully brought to the attention of the Congress in connection with its consideration of farreaching amendments to Title VII in 1971 and 1972, and, at that time, Congress made clear that Title VII was not intended to prohibit reasonable race conscious affirmative action designed to overcome the relative absence of minorities or women from any segment of the workforce.

[5] Section 703(j), which provides that the Act shall not be interpreted to require preferential treatment or racial balancing, reflects Congress' intention with respect to the *requirements* of the legislation, but does not address the issue of voluntary race conscious action.

In 1969, the Department of Labor issued the Philadelphia Plan, in implementation of Executive Order 11246. The Plan, for the first time, required government contractors to agree to numerical goals for the entry of minorities into skilled craft classifications in which they were underutilized. Underutilization was to be determined by a comparison of the employer's work force with data showing the "availability" of qualified minorities in the relevant geographic area. The Plan made clear that the numerical requirements were dependent only on underutilization and not on a finding of illegal discrimination by the contractor.[6] In fact, because of craft union referral systems, the contractors had no direct responsibility for the relative absence of blacks from their construction projects.

The validity of the Philadelphia Plan was tested in *Contractors Association* v. *Schultz*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The contractors argued, *inter alia*, that the Plan required them to discriminate against white craftsmen in violation of Section 703(a), by classifying employees by race and by preferring black craftsmen in order to meet the established goals.

The Third Circuit rejected this argument.

> To read Section 703(a) in the manner suggested by plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention from the language of the statute or from its legislative history. . . . We reject the contention that Title VII prevents the President acting through the Executive

[6] These concepts are embodied in the current Office of Federal Contract Compliance Programs regulations, 41 C.F.R. §§ 60-2.10 through 2.13.

> Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades."

442 F.2d at 173.[7]

When Congress began consideration of amendments to Title VII in 1971, the Philadelphia Plan and the decision of the Third Circuit in *Contractors Association* were very much in the forefront of the debate. See generally Comment, "The Philadelphia Plan: A Study in the Dynamics of Executive Power," 39 U. Chi. L. Rev. 723, 751 ff. (1972). Both Houses of Congress voted on and rejected amendments which would have forbidden the imposition of numerical goals under the Executive Order. In the Senate, Senator Ervin proposed to amend Section 703(j) to forbid the imposition of numerical requirements under the Executive Order, as well as under Title VII.[8] This amend-

[7] The contractors also made constitutional arguments that were rejected by the Court. 442 F.2d at 166, 176. See note 11, *infra.*

Subsequently, the same conclusions were reached in similar litigation in the First and Seventh Circuits. *Associated General Contractors of Massachusetts* v. *Altschuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972).

[8] The Ervin proposal would have amended Section 703(j) to read:

> Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . . in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

118 Cong. Rec. 4917 (1972).

ment was debated explicitly in the context of the Third Circuit decision upholding the Philadelphia Plan. Indeed, in the course of his argument opposing a related amendment, Senator Javits caused the opinion of the Third Circuit in *Contractors Association* to be reprinted in the Congressional Record, 118 Con. Rec. 1665, and opposed the amendment precisely because it would interfere with the type of numerical goals upheld by the Court of Appeals. *Id.* at 1664-65. See also 118 Cong. Rec. 1385 (1972) (remarks of Senator Saxbe). The Ervin amendment was defeated by a two to one margin.[9] A similar amendment, proposed by Congressman Dent, was rejected in the House.[10]

Of course, Congress' rejection of the Ervin and Dent amendments does not resolve the constitutional questions that exist concerning the imposition of numerical goals

[9] 118 Cong. Rec. 4918 (1972).

[10] Congressman Dent's amendment to the bill to amend Title VII would have prohibited the imposition of numerical goals in the enforcement of the Executive Order. 117 Cong. Rec. 31784 (1971). After it was proposed, a substitute bill was introduced by Congressman Erlenborn, which would not have so limited Executive Order enforcement. Opposing the Erlenborn substitute, Congressman Dent stated:

> You are giving quotas and preferential treatment the blessing of your vote if you vote for the Erlenborn amendment.

Id. at 32090. Shortly thereafter, the Erlenborn amendment was adopted, thereby deciding the matter, and Congressman Dent did not thereafter bring his amendment up for a vote. Id. at 32111.

under the Executive Order.[11] But it does represent a definitive expression of Congress' intention that *Title VII* does not prohibit the imposition of numerical goals under the Executive Order. See *Albermarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 414, n. 8.[12] And if the imposition of

[11] See e.g., *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, 2754 & n. 40 (Powell, J.); *United States* v. *NOPSI*, 553 F.2d 459 (5th Cir. 1977), vacated, 98 S.Ct. 2841 (1978); *Contractors Association* v. *Schultz*, *supra*, 442 F.2d at 166, 176. As the plan under attack in this case was voluntarily adopted by Kaiser and the Steelworkers, and not proposed or imposed by the Government, the constitutional validity of the imposition of numerical goals by the Department of Labor under the Executive Order is not an issue in this case.

Moreover, this case does not involve the conflict that may exist between the Department of Labor's interpretation of the requirements of the Executive Order as it affects seniority, and the interpretation of Section 703(h) by this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). See *United States* v. *East Texas Motor Freight, Inc.* 564 F.2d 179 (5th Cir. 1977).

[12] *Moody* was a Title VII case involving the issue of the entitlement to back pay of class members who had not filed their own charge of discrimination with the Equal Employment Opportunity Commission. In connection with its consideration of the 1972 amendments to Title VII, Congress rejected an amendment that would have overruled lower federal court decisions allowing the award of backpay to class members who had not filed a charge. In *Moody*, this Court held that, in rejecting the proposed amendment, the Congress had "ratified" these interpretations and settled the issue. 442 U.S. at 414, n. 8. The identical analysis applies in this case.

Moreover, under decisions of this Court, Congress has acquiesced in the affirmative action requirements imposed under the Executive Order by annually appropriating funds for the Office of Federal Contract Compliance in the Department of Labor with full knowledge that affirmative action requirements are at the heart of OFCCP's enforcement efforts. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 293-4 (1958); *Service* v. *Dulles*, 354 U.S. 363, 380 (1957); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 119 (1947); *Brooks* v. *Dewar*, 313 U.S. 354, 360-361 (1940); *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147 (1937). See also *In Re Subpoena of Persico*, 522 F.2d 41, 65 (2d Cir. 1975). In fact, on one occasion, Congress rejected an effort to forbid the expenditure of funds to enforce numerical goals as part of the OFCCP's program. See Comment, "The Philadelphia Plan: A Study of the Dynamics of Executive Power," 39 U. Chi. L. Rev. 723, 747-750 (1972).

numerical goals under the Executive Order does not violate Title VII, there is no principled way in which the voluntary adoption of numerical goals by private parties, in similar circumstances, can be held to violate the statute.

The decision of the court of appeals accepted voluntary race conscious action, but only when the employer's past conduct is later found to be unlawful under Title VII.[13] This standard effectively precludes voluntary race conscious action. Title VII law is sufficiently cloudy, and so dependent on factual findings involving issues of credibility, that it is usually difficult to predict whether or not discrimination would be found. Moreover, the employer would, by taking voluntary action, put itself in a no-win situation in a suit such as this. Either its past conduct will be determined to be unlawful, thereby inviting litigation by discriminatees, or the remedial action will be found unlawful, and liability to white employees will exist.

This standard is not only wrong as a matter of policy, it is unworkable in practice. In a suit by a white employee

[13] The court of appeals reached this conclusion because of its view that race conscious remedial measures could be adopted by private parties only in circumstances in which they would be ordered by a district court after a finding of a violation of Title VII. 563 F.2d at 224. For the reasons stated in text, *amici* believe that Congress' intention to the contrary is clear, and that, therefore, this case does not require a decision on the issue of whether courts may impose numerical quotas in fashioning remedies under Section 706(g). Compare *County of Los Angeles* v. *Davis*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S. L. W. 3780 (1978).

to enjoin affirmative action by the employer, there may be no party in court with the motivation to establish past discrimination. The result, as the record of this case demonstrates, is that the evidence and arguments on which a finding of discrimination could be based may not be submitted to the trial court.[14] As Judge Wisdom points out in dissent, the decision of the court of appeals bases the outcome of the litigation on the determination of a fact, as to which all litigants can be expected to take the same position. 563 F.2d at 231. This is not a suitable rule of law.

The court of appeals has misconstrued Title VII. In accordance with the expressed intent of the Congress, voluntary remedial action should be sustained under Title VII, if it is a reasonable response to the absence or relative absence of minorities or women from the workforce, or a significant segment thereof. On this standard, the agreement between Kaiser and the Steelworkers plainly passes muster.

II. The Kaiser-Steelworker Training Agreement is Lawful Under Title VII

A. The Record Establishes a Basis for Remedial Action

The record shows that in 1974, only 5 of 290 craftsmen were black, and that many crafts at the Gramercy plant included no blacks. A. 64-65. Blacks comprised 39% of the available workforce, A. 60-61 and according to Census Data, 21% of the available craftsmen.[15] This evidence is

[14] See pp. 15-16, n. 16, *infra.*

[15] Gramercy is located on the border of St. James and St. John the Baptist Parishes, halfway between New Orleans and Baton Rouge. In 1970, blacks constituted 21% of the available "craftsmen and kindred workers" in these parishes. Bureau of the Census, Characteristics of the Population, Vol. I, part 20, Tables 122 and 127 (1970).

The crafts in which persons are employed at Kaiser's Gramercy plant are painter, electrician, carpenter, machinist and repairman. A. 64-65. There are no Parish figures broken down for these crafts, but statewide, New Orleans and Baton Rouge figures are available. The percentages of blacks, computed by counsel from Census Data, are as follows:

	Statewide	Baton Rouge SMSA	New Orleans SMSA
Construction carpenters	21%	34%	27%
Construction electricians	3%	2%	4%
Construction & maintenance painters	28%	28%	36%
Mechanics & repairmen	15%	9%	14%
Machinists (and job and die setters)	10%	16%	5%
All crafts & kindred workers	16%	18%	19%

Id. at Table 172.

[16] There is, in fact, a substantial question as to whether Kaiser was guilty of racial discrimination in filling craft jobs in Gramercy. The findings of the courts below to the contrary are entitled to little weight because the issue was not contested. See pp. 13-14, *supra.* Apart from the statistical disparity between the 2% black craftsmen at Kaiser and 21% black craftsmen in the area, compare *Hazelwood School District* v. *United States,* 97 S.Ct. 2736, 2743, n. 17 (1977). the record shows that the company had applied an entry requirement of five years of industrial experience in the crafts—prior to employment in Gramercy. This requirement effectively excluded blacks from craft jobs on account of racial discrimination in the building trades in southeastern Louisiana. See p. 5, *supra.* There is no evidence that the prior industrial experience requirement was ever validated by Kaiser. To the contrary, OFCC documents lodged with the Clerk in this case by the Solicitor General include 1973 findings that Kaiser had not validated its prior industrial experience requirement.

(Footnote cont.)

more than sufficient to justify reasonable efforts by Kaiser and the Steelworkers to correct the absence of blacks from craft jobs.[16]

B. The Training Program was a Reasonable Response to the Absence of Blacks in Craft Jobs.

A number of factors make clear that the Kaiser-Steelworkers plan was a reasonable response to the absence of blacks in craft jobs.

First, neither respondent Weber nor any other employee lost any employment opportunity, or any expectation of employment opportunities, as a result of the institution of the training program. No seniority rights for entry into craft training previously existed. Prior to the institution of the program, there was no way in which an employee who did not already have the skills could acquire them and promote to a craft job while at the Gramercy plant. The training program did not constitute a *diversion* of employment opportunities, in response to the absence of blacks in craft jobs, but the *creation* of additional opportunities.

Second, the program adopted by Kaiser and the Steelworkers provided additional opportunities for both black and white employees.

Third, allocation of 50% of the training vacancies to blacks constituted a reasonable division of the new opportunities, considering the 46% black population in the area. Because less than half of the new craft vacancies were to be filled from the training program, and because of the relatively low turnover in these attractive jobs, the allocation of 50% of training vacancies to blacks would result only in a very gradual increase in black representation in the crafts. A. 68-69.

Fourth, given the decision to allocate the training opportunities half to blacks and half to whites, the system of selecting the senior bidder within each racial group *itself* has no racial implications. Indeed, this system, agreed to by the company and the union, was the best available procedure for achieving the 50-50 allocation, and at the same time recognizing the equity of prefering incumbents in order of their length of service.

Other methods were available for the selection of trainees that would have achieved substantial representation of blacks, without establishing any overt racial classification. Specifically, training vacancies could have been awarded to the *youngest* [17] applicants in the work force (half of whom

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This evidence establishes a *prima facie* violation of Title VII by Kaiser in craft entry. In *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), a Title VII case involving Kaiser's plant in nearby Chalmette, Louisiana, the court of appeals held that a *prima facie* case of discrimination in craft entry had been established on the basis of statistical evidence strikingly similar to that in this Record, and on the basis of a prior industrial experience requirement—for which no validation had been shown—that was apparently the same as that imposed by Kaiser in Gramercy.

Moreover, major issues concerning Kaiser's craft entry practices were not explored at trial. For example, if the prior industrial experience requirement had not been consistently applied to whites, but had been applied to exclude blacks from craft jobs, there would be an obvious violation of the Act. Material lodged with the Clerk in this case by the Solicitor General shows that, in 1973, the OFCC found that Kaiser in Gramercy had waived the experience requirement in the case of whites. And in *Parson* v. *Kaiser Aluminum & Chemical Corp., supra*, there was evidence in the record that Kaiser had not consistently applied its prior industrial experience requirement to whites at its nearby Chalmette Plant. See 575 F.2d at 1381.

Similarly, at Chalmette, Kaiser imposed unvalidated written tests and formal education requirements for entry to craft jobs. *Id.* There is no indication in this record as to whether similar requirements were applied in Gramercy.

[17] Apprenticeship training programs are exempted from the strictures of the Age Discrimination in Employment Act. See 29 C.F.R. § 860.106.

are black) or to new hires—not unreasonable standards from the employer's point of view, considering the expense and length of craft training. Either selection standard would have resulted in substantial black participation, approximating the result under challenge here. But these methods would have needlessly sacrificed the seniority interests of the incumbent workers.

Fifth, selection of trainees without regard to race on the basis of employment seniority, as demanded by respondent, would be totally at odds with the purpose of the company and the union in establishing the training program. If selections were made on the basis of employment seniority, it would be many years before any significant numbers of blacks would be admitted. A. 113.

Moreover, selection on the basis of seniority would have perpetuated Kaiser's apparent past discrimination in non-craft hiring. The evidence shows that from 1958 through 1969 only 10% of the non-craft employees hired by Kaiser were black, although the available labor force was 39% black, and that other than craft jobs, the entry positions at the Gramercy plant do not require any special skills or prior experience. A. 123. Disparities of this dimension in filling unskilled jobs establish a *prima facie* case of hiring discrimination under Title VII. *Dothard* v. *Rawlinson*, 97 S.Ct. 2720, 2726 (1977).

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court explicitly recognized that, where there has been past exclusion of blacks from a seniority unit, the use of seniority to allocate future opportunities perpetuates the effects of the past discrimination. The Court stated that such a system would violate Title VII, under the standards articulated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), except for the immunizing

effect of Section 703(h) of the Act. 431 U.S. at 349. While *Teamsters* holds that, because of Section 703(h), it is not unlawful to allocate employment opportunities on the basis of a preexisting seniority system, it is quite another matter to conclude that, when an employer and a union are negotiating a system of selection for a new training program, particularly one adopted in response to the absence of blacks in the crafts, Title VII *requires* the adoption of a system that perpetuates past discrimination and results in the continued exclusion of blacks from the crafts. Compare *Gates* v. *Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974).

Sixth, the selection system challenged by respondent was negotiated and agreed to by the union that is the exclusive bargaining representative of all the production and maintenance employees in the Gramercy plant. We have pointed out that no seniority rights and no seniority expectations of the respondent were abridged by the 1974 Training Agreement. But even if that were not the case the collective bargaining agent, acting in good faith and in order to promote national policy and what it perceives to be the best interests of all of the employees in the bargaining unit, is free to enter into agreements calling for seniority modifications.

> This Court has . . . held that a collective bargaining agreement may . . . enhance[d] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objec-

> tive of the "highest priority," is certainly no less than in other areas of public policy interests.

Franks v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 770, (1976). See also *Steele* v. *Louisville & N. Ry.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

> An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a majority of the bargaining unit, serves as a check on the fairness of the plan.

Weber, 563 F.2d at 233 (Wisdom, J., dissenting).

Here, acting pursuant to its affirmative duty to root out discrimination, see *Emporium-Capwell* v. *WACO*, 420 U.S. 251 (1975), the Steelworkers determined that the 1974 Training Program was in the best interests of all of the members of the bargaining unit, because it created new training opportunities for all employees, it did not deprive any employee of any rights or expectations, and it would operate to correct the traditional exclusion of blacks from craft jobs. Title VII does not afford respondent any rights to overturn that judgment.

CONCLUSION

The decision of the court below should be reversed and the respondent's complaint should be dismissed.

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Dated: January 25, 1979

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
Nos. 78-436, 78-435, 78-432

UNITED STATES OF AMERICA
and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
KAISER ALUMINUM & CHEMICAL CORPORATION,
& UNITED STEEL WORKERS OF AMERICA,

Petitioners,

v.

BRIAN F. WEBER,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

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Other Authorities:

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Executive Order 10479, 18 Fed. Reg. 4899 (1953)..... 12n

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IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-436, 78-435, 78-432

UNITED STATES OF AMERICA
and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
KAISER ALUMINUM & CHEMICAL CORPORATION,
& UNITED STEEL WORKERS OF AMERICA,

Petitioners,

v.

BRIAN F. WEBER,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

Interest of the *Amicus*

The National Association for the Advancement of Colored People (NAACP) is the oldest, largest civil rights organization in the nation, with over 500,000 members in its 1,800 branches across the country. Since the early 1940's, when the NAACP with A. Philip Randolph threatened a march on Washington prompting President Roosevelt to issue the first Executive Order banning racial discrimination by government contractors, to the present day, the amicus has brought all of its resources to bear upon eliminating racial discrimination in employment. The

NAACP has conferred and cooperated with the Executive branch, proposed and supported the very legislation which is threatened with judicial nullification by an affirmance here, and litigated unrelentingly to enforce this country's equal opportunity laws. Slowly over the past decade, the NAACP has found that employers and labor unions have willingly begun to voluntarily abandon their discriminatory practices. They have, on rare occasion, been persuaded to begin taking positive steps to recruit, hire and promote minorities without resort to threats of demonstrations, boycotts, litigation, and loss of federal funding. The amicus has long considered itself in the forefront of the private sector encouraging precisely the kind of affirmative action undertaken by Kaiser at its Gramercy plant.

The NAACP now finds, as a result of the decisions below, that the consequences of a quarter-century of promoting equal opportunity laws are being turned inward against minorities in a wholly destructive manner. The majority panel of the court below would find a conflict between Executive Order 11246 and Title VII and, as a result, would strike down compliance with the Order while discouraging voluntary compliance with the statute. Reversal of the courts below would operate as a positive signal to the country that integration of the workforce is still the will of Congress and that social damage done by an affirmance is de minimus.

Consent of the Parties

Pursuant to Rule 42, the written consent of the Petitioners accompanies the filing of this brief. Written consent of the Respondent has been mailed to the Clerk of the Court.

Introduction and Summary of the Argument

The argument of the amicus is based upon a presumption that the Respondent, Brian F. Weber, has sufficiently established a prima facie case of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as a plaintiff's burden of proof is usually measured under the statute.[1] The burden of going forward would then shift to Kaiser and the Steelworkers to justify the racial preferences embodied in their entry requirements to craft training positions. This justification must be one which fosters a lawful purpose, it must be necessary to achieve its purpose, there must be no reasonable alternative available which would avoid the use of a racial preference, and Congress must have intended that such a purpose be protected under the statute.

At the trial below, Kaiser established that its adoption of the selection ratio, based upon race, for entry into its craft training programs was done in order to insure that, in time, the racial composition of its craft jobs would approximate that of the labor market from which it hired its employees. The company was motivated to adopt this procedure in response to pressure from the Office of Federal Contract Compliance to integrate its skilled jobs as much as the well founded apprehension of Title VII litigation initiated by its black employees or applicants. In this sense, Kaiser's affirmative action was "voluntary."

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[1] Amicus is aware that other amici are arguing that Kaiser's attempted compliance with Executive Order 11246 results in Weber having failed to establish even a prima facie violation of Title VII. While generally agreeing with this proposition, the argument of the amicus demonstrates that, even if Weber is considered to have shifted a burden of establishing an affirmative defense upon the company at trial, the company has met its burden of defending the use of a limited racial preference.

The company demonstrated at trial that it had tried a variety of measures toward integrating its craft jobs prior to the negotiation of the 1974 agreement with the union, but that none of these measures had been successful. It concluded that only a limited racial preference, coupled with the affirmative hiring program it had begun in 1969, would produce the desired results.

The legislative history of Title VII, its 1972 amendments, the Executive Order program for government contractors, and the recent blending of the statute with the Executive program approved by Congress clearly reflect Congressional intent that the kinds of steps taken by Kaiser in this case are lawful under Title VII.

ARGUMENT

Kaiser's Craft Training Selection Criteria, Providing a Limited Racial Preference, Were Established in Compliance With Title VII of the Civil Rights Act of 1964 and Executive Order 11246 and Constitute a Defense to Respondent Weber's Prima Facie Case.

A. Respondent Established a Prima Facie Violation of Title VII.

Prior to 1974, Brian Weber and all but a few of his co-workers at Kaiser's Gramercy plant had been unable to obtain a skilled craft job with the company. The primary source of craft employees had been the all-white pool of journeymen members in the local construction industry, because virtually none of the company's incumbent employees possessed the skills and experience which the company required to perform the various jobs. Even when the company inaugurated a training program for incumbents in general repair and carpenter/painter trades,

with lowered experience requirements for entry into the program, only a few employees could qualify for the jobs. Tr. 57-59.

In 1974, the collective bargaining agreement and Memorandum of Understanding negotiated by the company and the union created new employment opportunities for Kaiser's incumbent employees. For the first time, they could enter a training program which, if successfully completed, would lead to skilled craft jobs. The training jobs were posted for bid and employees were selected on the basis of their seniority, with selections being made according to a ratio of one black to one white employee.

In April 1974, training positions were posted for bid and employees were selected according to the established ratio. Under this procedure, some members of Weber's class were not selected while black employees with less seniority were selected. In October, a single vacancy in the insulator trainee occupation was posted and apparently, because the last vacancy filled had gone to a white employee under the ratio formula, the job was available to black bidders only. Weber testified that he was therefore barred from bidding on the vacancy. Tr. 32-34.

Title VII generally prohibits the exclusion of any person from employment opportunities on account of their race. 42 U.S.C. §2000e-2. The rights conferred by the statute are individual rights, and they were conferred upon whites as well as minorities. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).[2] Persons challenging practices as violative of Title VII must show that they were treated differently on account of their race,

[2] The *McDonald* decision did not raise the issue of whether affirmative action compliance may constitute a defense under Title VII. *Id.* at U.S. 280 n. 8.

or that the practice complained of had a disparate impact upon them, *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977), in order to establish their prima facie case.

Under either of the two theories of analysis articulated in *Teamsters*, Weber may arguably have established a prima facie violation of Title VII. He has shown that, in general, white employees are disproportionately excluded from craft training positions. In December 1974, whites comprised 85.2 percent of the hourly workforce, Tr. 50, yet they were allowed to compete for only 50 percent of the available training positions. Moreover, in October 1974, a position was posted for bidding which was explicitly foreclosed to white employees.

Assuming a prima facie showing, Weber successfully shifted the burden of going forward to Kaiser and the union to prove "some . . . affirmative justification" for the racial preference created by the craft training program entry procedure. *City of Los Angeles, Dept. of Water and Power* v. *Manhart*, 55 L.Ed.2d 657, 667 (1978).

B. Racial Preferences, Used in the Manner and for the Purpose of Those Challenged by Respondent Weber, Have Been Approved by Congress Under Title VII and Constitute an Affirmative Defense Under the Statute.

When Kaiser and the Steelworkers agreed to begin offering training positions for craft jobs according to a racially based ratio in 1974, the record clearly indicates that they were responding to a perceived vulnerability under both Executive Order 11246 and Title VII. Thus, their action was "voluntary" only in the sense that it was not ordered by a court.

Until 1969, Kaiser's Gramercy plant had a minority population of approximately 10 to 11 percent. Tr. 35. Since

that time its accelerated hiring of minorities produced a black hourly workforce of 14.8 percent by December 1974. Tr. 50. Yet, throughout this period the black percentage of the available labor market was 39 percent. Tr. 95-96. Despite the fact that the company had, for reasons which no party to the litigation felt compelled to explore, a workforce composed of substantially less than half of the minority proportion of the local labor market, its minority population of the skilled craft workforce was even smaller. Prior to the 1974 agreement under attack, Kaiser employed only 5 minorities, or 2.5 percent, among its 290 craftsmen. Tr. 98. This was so, the record discloses, because it had traditionally dipped into a virtually all-white pool to fill these positions. J. Ex. A.

In early 1971, the Office of Federal Contract Compliance submitted its evaluation of Kaiser's contract compliance posture to the company.[3] The OFCC identified many serious deficiencies in the plant's compliance with applicable regulations, and it noted specifically that none of its 246 craftsmen were black. A craft training program was suggested by the agency, with a careful evaluation of the potential in its black workforce to be conducted for such a program. The OFCC also stated that any continued direct hiring into craft jobs "should include at least the minority ratio that exists in the company's recruitment area."

A subsequent contract compliance review conducted by the U.S. Atomic Energy Commission in 1973 revealed that Kaiser had allowed several white employees who did not possess the stated experience criteria to transfer

[3] The OFCC's findings and recommendations as well as its cover letter dated January 25, 1971, accompanying the findings have been supplied to the Court by the Department of Justice with its Petition for Writ of Certiorari.

into the skilled crafts.[4] As a consequence, Kaiser agreed to allow black employees to transfer into these jobs who had experiential qualifications equal to that of the least experienced white who had been allowed to transfer. In addition, Kaiser agreed to either validate or eliminate the experience requirements for direct hire or transfer into the maintenance crafts. Kaiser's response to the OFCC compliance reviews was to establish its training program with the racial preference to which the Respondent is objecting. The company stated at trial that it had first lowered, then dropped altogether, any experience requirements for entry into the training programs. Tr. 115.

At the trial, Kaiser demonstrated that there were essentially three factors which led it to adopt the craft training program in 1974. The first was pressure from its government contracting agencies. It stated that the government's position on devising a mechanism for placing minorities into craft jobs was "do it or else." Tr. 77. Under questioning by the trial court, Kaiser explained:

> "... a recommendation from them is pretty much telling us that we ought to do that if they are going to approve our affirmative action plan. If they don't approve our plan and we are held in violation of that, then ... in the end, we either then lose as an entire corporation, not just our Gramercy plant, but as an entire corporation, all Government contracts, or contracts with other company that does business with the Government." Tr. 86.

The second factor considered by Kaiser was the threat of Title VII litigation initiated by its own black employees

[4] A copy of the AEC's January 31, 1973 report has been supplied to the Court by the Department of Justice with its Petition for Writ of Certiorari.

and applicants.[5] Tr. 87-88. It stated that, in addition to the OFCC compliance reviews, the Equal Employment Opportunity Commission and two civil rights organizations, including the amicus, had "been into that plant."[6] Tr. 87. At Kaiser's Baton Rouge plant, less than 40 miles from Gramercy, black employees had filed a Title VII suit against the company which was ultimately resolved by a consent decree. *Burrell* v. *Kaiser Aluminum & Chemical Corp.*, CA No. 67-86 (M.D. La., decree filed February 24, 1975). At its nearby Chalmette, Louisiana, plant, black employees had filed EEOC charges in 1966, a Title VII suit in 1967, and had completed an extensive trial involving, *inter alia,* the filling of craft jobs, by early 1974. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), *rehearing denied per curiam,* 583 F.2d 132 (1978).

The third factor prompting the 1974 agreements with the Steelworkers' union was a more typical collective bargaining concern. The union was anxious to keep the filling of skilled craft jobs within its own jurisdiction by having them filled with union incumbents rather than construction trade journeymen hired off the street. Tr. 58, 71. At Kaiser's Baton Rouge plant, these same craft jobs were not under the jurisdiction of the Steelworkers but rather had been organized by the building trades. Tr. 118.

[5] Both the 1971 and 1973 compliance reports which the Department of Justice has lodged with the Court in connection with this case noted that several of Kaiser's black employees had informed compliance agency officials of discriminatory practices at the Gramercy plant.

[6] Kaiser's acknowledgement on the record that the EEOC had been investigating its Gramercy plant indicates that EEOC charges had been filed by black employees or applicants, since the Commission only acts in response to complaints filed pursuant to the statute. 42 U.S.C. §2000e-5(b).

Kaiser established on the trial record, without rebuttal or conflicting evidence from Weber, that there were no alternatives to the racial preference formula which it adopted that would permit the integration of its skilled craft jobs. It showed that the company had advertised craft job opportunities in minority newspapers in Baton Rouge and New Orleans and maintained racially identified application files in order to give consideration to black applicants when vacancies arose. Tr. 56. It had initiated a training program for the jobs of general repairman and carpenter-painter and had lowered the experience requirement but still could not meet its manpower needs for those positions. Tr. 57-59. The company offered uncontradicted testimony that it knew of no other means available to obtain trained black craftsmen.[7] Tr. 60.

The question presently before the Court is therefore whether the actions taken by the company and the union in 1974, principally designed to comply with Government contract obligations and to ward off the likelihood of Title VII litigation initiated by black workers, have been sanctioned by Congress under the statute.

[7] Obviously, some other ratio than one black for one white could have been selected by the company and the union, and a different ratio would produce a faster or slower entry rate for blacks into the training jobs. However, it is the use of any racial preference whatsoever that the Respondent has challenged, not whether some other ratio would be more appropriate. The record also suggests that alternatives exist with respect to the pools of available labor. For example, continued hiring from the available labor market which is 39 percent minority instead of or in combination with hiring from the plant workforce composed of some 15 percent minorities would increase the natural flow of black trainees. But even this kind of modification of the source of employees would require a racial preference to accomplish the integration of craft jobs. The company showed at trial that the post-1969 hiring ratio for production jobs had resulted in a rise in the proportion of black employees at the rate of only one percent per year, and that its turnover rate for craft jobs was even slower. Tr. 93.

In previous cases arising under Title VII, this Court has often given effect to defenses interposed against practices which would otherwise have been violative of the statute. *Teamsters* v. *U.S.*, 431 U.S. 324 (1977) (bona fide seniority system exception); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (bona fide occupational qualification exception); *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977) (timeliness of EEOC charges). In addition, the Court has frequently referred to defenses which do not appear as an explicit statutory exception to the Act, but which were clearly intended by Congress in the legislative history and underlying purposes of the Act. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Co.*, 423 U.S. 824 (1976); *Teamsters* v. *U.S., supra* (business necessity).[8] In *Los Angeles Dept. of Water and Power* v. *Manhart*, 55 L.Ed.2d 657 (1978), a case involving pension contributions explicitly based upon sex, the Court indicated that an exemption under the Equal Pay Act "or some other affirmative justification," intended by Congress in the passage of Title VII, would constitute a defense. In deciding whether to apply or deny a proffered defense in these cases, the Court has always been guided by the intent of Congress as reflected by the language of the legislation itself or by its legislative history.

In this case, voluntary compliance with Executive Order 11246 has been pled as a defense. The history of the

[8] In *Griggs* and *Albemarle Paper*, the Court has also recognized that employment tests, properly validated under applicable EEOC Guidelines, will be upheld despite the existence of a racial impact. The Court has further found that Congress intended to protect employment terms and conditions which adversely affect adherents to particular religions, when modification of those terms and conditions to accommodate employees would place more than a minimal burden upon the employer. *TWA* v. *Hardison*, 423 U.S. 63 (1977).

Government's contract compliance program and the legislative history of Title VII itself clearly reflect Congress' intent that racial preferences, appropriately utilized and conforming to contract compliance requirements, should not be struck down under Title VII.

By the time Title VII was being debated by the 88th Congress, the contract compliance program growing out of a series of Executive Orders had been a part of the Government's effort to integrate the national workforce for over 20 years. Executive Order 8802, 6 Fed. Reg. 3109 (1941), issued by President Roosevelt, was the first attempt to utilize the Government's contract program as a vehicle for both eradicating racial discrimination in private employment and encouraging integration of the national workforce. The policy of the Government articulated in that Order was clearly to effectuate the goal of integration:

> "To encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders." *Ibid.*

Subsequent to this Order, both Presidents Truman and Eisenhower issued Executive Orders mandating nondiscrimination by Government contractors.[9] By the time Con-

[9] Prior to the Truman Order, President Roosevelt issued Executive Order 9346, 8 Fed. Reg. 7183 (1943), establishing a second Fair Employment Practices Committee to promote the full utilization of manpower and eliminate discrimination. President Truman issued Executive Order 10308, 16 Fed. Reg. 12303 (1951), establishing a Committee on Government Contract Compliance whose purpose was to evaluate the effectiveness of the contract compliance program. President Eisenhower issued Executive Order 10479, 18 Fed. Reg. 4899 (1953), establishing the President's Committee on Government Contracts.

gress began debating passage of the 1964 Civil Rights Act, President Kennedy had issued Executive Order 10925, 26 Fed. Reg. 1977 (1961), an Order which for the first time required more than commitments not to discriminate from Government contractors. Contractors were required to commit themselves to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." E.O. 10925, Sec. 301. The Order provided for enforcement mechanisms including debarrment and contract termination, but it contemplated great reliance upon the voluntary compliance of contractors. Enforcement personnel were directed to "seek compliance with the objectives of this order by conference, conciliation, mediation, or persuasion." *Id.* at Sec. 307. Again, before any sanction proceedings were begun, the contracting agency was directed "to secure compliance with the contract provisions of this order by methods of conference, conciliation, mediation, and persuasion. . . ." *Id.* at Sec. 312 (f). Thus, the Executive Orders in effect during the period of Title VII's debate in 1964 required affirmative action going beyond the mere cessation of any past discriminatory practices; and the enforcement of the Order depended heavily on voluntary compliance by Government contractors.[10]

Congress' intent to preserve the Executive Order contract compliance program with its emphasis on affirmative action and voluntary compliance is clear from the legislative history of Title VII both in its genesis and in its 1972

[10] Prior to the effective date of Title VII, the Kennedy Order was extended on two occasions. President Kennedy issued Executive Order 11114, 28 Fed. Reg. 6485 (1963), in order to include the area of construction contracting within the ambit of the compliance program. President Johnson issued Executive Order 11141, 29 Fed. Reg. 2477 (1964), to include nondiscrimination on the basis of age.

amendments. As this Court has noted, Congress rejected an effort to have Title VII be the primary federal remedy for employment discrimination at the time of the Act's inception.[11] 110 Cong. Rec. 13650-52 (1964); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n. 9 (1974). In addition, Title VII as originally enacted contained two sections designed to blend, to some extent, the overlapping obligations which the statute and the Order placed on employers. Compliance with the record-keeping portions of the Executive Order would exempt employers from similar requirements of Title VII, 42 U.S.C. §2000e-8(d), and the President was instructed to convene meetings of the President's Committee, the Commission on Civil Rights, state and local FEP agencies, civil rights agencies, and members of the business community for the purpose of informing employers and unions of their obligations under Title VII. 42 U.S.C. §20000e-15. The Clark-Case interpretative memorandum, introduced for the purpose of explaining the House-approved bill in the Senate, stated that Title VII "has no effect on the responsibilities of the [President's Committee] or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of . . . Federal contracts." 110 Cong. Rec. 7212-7215 (1964). Thus, not only did Congress fail to perceive any conflict between the obligations imposed upon many employers by the Executive Order and Title VII, but it approved the simultaneous compliance activities of the responsible enforcing agencies and sought to inform employers of these dual obligations. Congress clearly

[11] The rejected amendment, offered by Senator Tower, did not even seek to eliminate the activity of the President's Committee on Equal Employment Opportunity. It merely proposed to protect employers subject to both Title VII and the Executive Order from being subjected to simultaneous investigations by the EEOC and the PCEEO, giving the EEOC primary jurisdiction.

sought to accommodate both the remedial nondiscrimination requirements of the statute with the affirmative action requirements of the Executive Order program.

Between July 2, 1965, the effective date of Title VII, and the beginning of debates on the 1972 amendments, the Executive Order applying to contract compliance was changed twice. Executive Order 11246 was issued on September 24, 1965, 30 Fed. Reg. 12319, and modified in part by Executive Order 11478, issued August 8, 1969, 34 Fed. Reg. 12985. Order No. 11246 required contractors to commit themselves by the terms of their contracts both to a policy of nondiscrimination as well as to taking affirmative action insuring that employees and applicants are not discriminated against. Pursuant to this Order, the Department of Labor promulgated a series of regulations both for construction and non-construction industry Government contractors, generally requiring them to analyze the racial composition of their workforce, identify the degree of underutilization of minorities based upon a careful review of a variety of factors, and establish goals and timetables for correcting the underutilization. Prior to the 1972 amendments to Title VII, the increasingly complex requirements of the Executive Order had successfully withstood attacks in the courts based upon their purported unconstitutionality and conflict with Title VII. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *Southern Illinois Builders Association* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *affirmed*, 471 F.2d 680 (7th Cir. 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D.C. N.J. 1970). Cf. *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964). Subsequent to Title VII's 1972

amendments, the courts have continued to uphold the contract compliance program as a valid means of integrating the national workforce. *Associated General Contractors of Massachusetts* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *EEOC* v. *A.T. & T.,* 556 F.2d 167 (3rd Cir. 1977), *cert. denied,* 98 S.Ct. 3145 (1978); *Rossetti Contracting Co.* v. *Brennan,* 508 F.2d 1039, 1045 n. 18 (7th Cir. 1975); *Northeast Construction Co.* v. *Romney,* 485 F.2d 752, 760 (D.C. Cir. 1973).

In 1972, as part of the debate on proposed amendments to Title VII, Congress again rejected an attempt to eliminate the Executive Order program by making Title VII the exclusive federal remedy for employment discrimination, 118 Cong. Rec. 3371-73, 3962, 3964 (1972), and it further refused to transfer the compliance program to the EEOC. *Id.* at 1387-98. Congress was well aware of the distinctions between the Order and the statute. Sen. Saxbe, speaking against the transfer of the OFCC to the EEOC, stated:

> The Executive order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 915. Congress also rejected two amendments offered by Sen. Ervin which would have prohibited federal agencies from requiring "discrimination in reverse" by employers, *id.* at 1017, 1074, or which would have banned preferential treatment due to racial or some other

imbalance between a workforce and an available labor force. *Id.* at 1714-1717. It was quite clear from the debates surrounding these unsuccessful amendments that it was the contracts compliance program, as typified by the Philadelphia Plan's litigation in *Contractors Association, supra,* that was protected by Congress.

Two of the amendments which were added to Title VII in 1972 reinforce the status of the contract compliance program in relation to Title VII. A section was added establishing the Equal Employment Opportunity Coordinating Council from various agencies charged with enforcing the federal civil rights in employment program. The Council was given the responsibility for:

> ". . . developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies."

42 U.S.C. §2000e-14. Government contractors, whose affirmative action plans had been accepted by a Government agency and who had not deviated substantially from the plan, were accorded a right of "full hearing and adjudication" before the denial, withholding, termination or suspension of the contract could take place. 42 U.S.C. §2000e-17. Thus, Congress in 1972 accorded important statutory rights upon Government contractors operating under affirmative action plans and, in addition, attempted to create a mechanism for harmonizing the obligations which the OFCC and EEOC placed upon contractor/employers.

If Kaiser had done nothing in 1974 but maintain its past practices of filling craft positions with white workers from the local construction trades, the company would undoubtedly have subjected itself to sanctions from the OFCC and of litigation by black workers or the EEOC itself under Title VII.[12] Congress was well aware of the duality of obligations placed upon employers such as those facing Kaiser prior to 1974; and Congress clearly intended for employers to comply with both. In rejecting both of the Ervin amendments to Title VII in 1972, Congress gave its clearest indication that an employer's use of racial preferences, if initiated pursuant to its affirmative action obligations under the Executive Order and carefully tailored to fit its particular needs in complying with the Order, would not violate Title VII. It was never intended that actual compliance with either the statute or the Order would create a violation of the other—and both the statute and the Order heavily encouraged voluntary compliance.

To the extent that there is a latent tension between the remedial use of racial preferences under Title VII and the affirmative use of such preferences contemplated by the Executive Order, both Congress and the Executive have recently undertaken to minimize, if not completely eliminate, that tension. Under President Carter's Reorganization Plan No. 1, 43 Fed. Reg. 19807 (1978), the Equal Employment Opportunity Coordinating Council has been abolished and all of its functions have been transferred to the EEOC. In addition, the EEOC itself has issued Guidelines relating to affirmative action under Title VII.[13]

[12] At the very least, Kaiser's past practices would have established a prima facie violation of Title VII *vis a vis* its black applicants and employees. The statistical imbalance, when coupled with racially exclusionary experiential criteria, would have placed the considerable burden upon the company of justifying the criteria under the doctrine of business necessity. *Teamsters* v. *United States, supra; Hazelwood School District* v. *U.S.*, 433 U.S. 299 (1977). In *Parson* v. *Kaiser Aluminum, supra,* the company was unable to successfully establish such a defense.

The decision of Mr. Justice Powell in last Term's decision in the case of *University of California Regents* v. *Bakke,* —— U.S. ——, 57 L.Ed. 2d 750, 778-9 (1978), strongly indicates that the decision in the instant case should be reversed. Two of the preconditions for utilizing racial preferences discussed in the opinion have been met here. First, there has been a determination by the administrative body charged with enforcing the Executive Order that Kaiser must utilize such a device in order to comply with the Order. This determination was made after at least two careful, on-site compliance reviews of the plant. Second, Kaiser's own perception of its vulnerability to a suit brought by blacks under Title VII, coupled with the known "various indicia of previous constitutional or statutory violations," *id.* at 779, n. 41, would have undoubtedly prompted the company to seek judicial approval of its 1974 program through the vehicle of a consent decree, had it been sued in court. Even the majority panel below acknowledged that Kaiser could have voluntarily

[13] The EEOC's Affirmative Action Guidelines were published on January 19, 1979. 44 Fed. Reg. 4422. They encourage employers to conduct a self-analysis and to determine whether there is a likelihood that they may not be in full compliance with Title VII. If such a likelihood exists, the Guidelines state:

> An employer or other person subject to Title VII who has a reasonable basis for concluding that it might be held in violation of Title VII and who takes remedial and/or affirmative action reasonably calculated to avoid that result on the basis of such self-analysis does not thereby violate Title VII with respect to any employee or applicant for employment who is denied an employment opportunity as a result of such action. The lawfulness of such remedial and/or affirmative action program is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to Title VII taking such action has violated Title VII.

undertaken any action that a court could have ordered or approved.

Whether the decision below is affirmed or reversed, the volume of litigation challenging discrimination and "reverse discrimination" will in all likelihood not abate. Indeed, one of Title VII's central themes is to encourage litigation by persons who perceive themselves as victims of discrimination. The statute's primary purpose, however, as it was legislatively tailored to fit and blend with the Executive Order contract compliance program, is to eliminate discrimination in employment, insure that it does not recur, compensate victims of the illegal discrimination, and ultimately foster the existence of a working society where factors such as race or sex are absolutely irrelevant. Affirmance of the decision below will have precisely the opposite effect.

CONCLUSION

WHEREFORE, for the reasons stated above, amicus respectfully urges that the decision below must be reversed.

Respectfully submitted,

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Certificate of Service

Michael W. Warren, Esq., one of the attorneys for the Amicus certifies that on the 25th day of January, 1979, I did serve three copies each of the foregoing Amicus Brief upon each of the attorneys for the Petitioners and Respondent listed below by mailing the same, postage prepaid, first class, as follows:

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Supreme Court, U.S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al.*,
Petitioners,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS *AMICI CURIAE*

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Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971). .57,61,66,67,68,75,87

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Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972) 66

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Sun Oil Co. v. Govoster, 474 F.2d 1048 (2d Cir. 1973). 45

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Triangle Industries, Inc. v. Kennicott Copper Corp., 402 F.Supp. 210 (S.D.N.Y. 1975). 45

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United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).22,36,52,71,72,113

United States v. Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978). .66

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115 Cong. Rec. 40921 (1969). 81

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117 Cong. Rec. 31981 83
117 Cong. Rec. 31984 83
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117 Cong. Rec. 32089 85
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118 Cong. Rec. 1663 (1972) 86

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118 Cong. Rec. 1665 (1972) 87,88
118 Cong. Rec. 1665-1675 (1972). . . .88
118 Cong. Rec. 1675-1676 (1972). . . .88
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124 Cong. Rec. 5371 (1978) 91,92
124 Cong. Rec. 5372 (1978) 92
124 Cong. Rec. 5374 (1978) 93
124 Cong. Rec. 5376 (1978) 93
124 Cong. Rec. 16280(1978) 93
124 Cong. Rec. 16283(1978) 94

Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978). 94

Books and Articles:

Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959). 115

Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L. Rev. 723 (1972). 75,76

Hart, H. & Sachs, A., The Legal Process: Basic Problems in the Making and Application of Law, 183-85 (Unpub. Ed. 1958). . . 116

James, Burdens of Proof, 47 U.Va.L.Rev. 51 (1961). 114

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Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977). 114-115

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

Petitioners,

-v.-

BRIAN F. WEBER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS AMICI CURIAE

Interest of the Amici*

The American Civil Liberties Union for 59 years has devoted itself exclusively to protecting the fundamental rights of the people of the United States.

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* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

For nearly a decade, the governing board of our 200,000-member national organization has vigorously debated the issue of "affirmative action"--particularly when the need to eradicate the cumulative effects of systemic discrimination against minorities results in the adoption of race conscious numerical measures.

The intensity and vigor of these discussions have heightened the ACLU's realization that the major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded. In recognition of this right, the ACLU has adopted the following statement of policy:

> "The root concept of the principle of non-discrimination is that individuals should be treated individually, in accordance with their personal merits, achievements and potential, and not on the basis of the supposed attributes of any class or caste with which they

> may be identified. However, when discrimination--and particularly when discrimination in employment and education--has been long and widely practiced against a particular class, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind' standards for selection among the applicants for available jobs or educational programs. Affirmative action is required to overcome the handicaps imposed by past discrimination of this sort; and, at the present time, affirmative action is especially demanded to increase the employment and the educational opportunities of racial minorities."

Pursuant to this policy, the ACLU supports, as an affirmative action measure, the use of "in-service training" which will "develop or upgrade the potential performance of under-represented groups in order to assure their retention and make the affirmative action program work in practice." The ACLU has further recognized that "in order to eradicate the effects of past discrimination and to increase the representation of substantially underrepresented groups," it is at times necessary to "support a requirement that a certain number of

persons within a group which has suffered discrimination be employed within a particular timetable." This is such a case. Accordingly, the ACLU urges this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit.

The Society of American Law Teachers is a professional organization, formed in 1973, of approximately 500 professors of law at more than 120 law schools in the United States. Among its stated purposes is the encouragement of fuller access of racial minorities to the legal profession; since its inception the Society has been active in supporting the adoption and maintenance of special minority admissions programs at American law schools. Its position is that voluntary affirmative action programs are fully consistent with the requirements of the federal laws designed to eradicate racial discrimination. The Society believes that affirmance of the decision below would seriously jeopardize the efforts of all American institutions which are trying to end the historic exclusion of blacks

and other racial minorities from the American mainstream.

For these reasons, the Society of American Law Teachers joins in this brief urging this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit, and to uphold the legality of voluntary affirmative action.

STATEMENT OF THE CASE

Pursuant to their 1974 Labor Agreement, petitioner Kaiser Aluminum & Chemical Corporation [hereinafter "Kaiser"] and petitioner United Steelworkers of America [hereinafter "Steelworkers"] agreed to institute on-the-job training programs in skilled craft classifications for the benefit of incumbent minority and white employees. In order to meet its affirmative action goal which it established pursuant to Executive Order 11246, Kaiser agreed with the Steelworkers that in the new on-the-job training programs "not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates." 1974 Labor Agreement, Addendum to Art. 9. See 563 F.2d at 222; 415 F.Supp. at 763.

The one-to-one entry ratio of this new training program was challenged as violative of Title VII by respondent Brian Weber, an incumbent unskilled white employee at Kaiser's plant in Gramercy,

Louisiana, who but for the 1974 Labor Agreement would have had no opportunity for employment in a skilled craft position. The district court upheld respondent Weber's challenge and enjoined petitioners from implementing their new training program with its one-to-one ratio. 415 F.2d 761 (E.D. La. 1976). A majority of a panel of the court of appeals affirmed. 563 F.2d 216 (5th Cir. 1977) (per Judges Gee and Fay; Judge Wisdom dissenting). Rehearing was denied. 571 F.2d 337 (5th Cir. 1978).

In reaching their decisions, the courts below found that Kaiser, prior to 1974, had maintained a nondiscrimination policy and in fact had not unlawfully discriminated against minorities in the past. 563 F.2d at 224; 415 F.Supp. at 764. Given the attenuated trial in this case, and especially given the interests and potential liabilities of the respective parties, that finding is hardly surprising.[1/] That finding, nonetheless,

1. This finding of no past discrimination against minority workers is not binding here because the courts below erred as a matter of law in applying Title VII law to Kaiser's past

does not alter the impact of other important facts in this case: (1) that petitioners[2/] reasonably could have believed that they had in the past discriminated unlawfully against minority workers; (2) that petitioners in fact were confronted with a prima facie case of unlawful discrimination against minority workers; (3) that petitioners' employment statistics manifested a severe deficiency in minority worker utilization; (4) that petitioners were confronted with possible liability in a minority or EEOC instituted lawsuit, and with possible loss of lucrative government contracts through enforcement of Executive Order 11246 by the Office of Federal Contract Compliance

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employment practices. In any event, other findings fully support the proposition that petitioners reasonably could have believed that they had discriminated unlawfully against minority workers in the past. See, pp. 9-16, infra.

2. Although the United States and the EEOC also are petitioners in this Court, they are not referred to in this brief. Our references to "petitioners" herein thus is intended to apply only to Kaiser and the Steelworkers.

Programs [hereinafter "OFCCP"]; (5) that petitioners were well aware of the government negotiations with the steel industry which led to the Steel Industry Consent Decree; and (6) that petitioners, aware of these facts, negotiated their 1974 Labor Agreement which denied no seniority expectations or job security to any incumbent white employees but which instead created new employment opportunities both for incumbent white employees and for incumbent minority employees.

Only through a review of this important factual background can the propriety of petitioners' 1974 Labor Agreement be fairly analyzed.

A. Petitioners Reasonably Could Have Believed That They Had Discriminated Unlawfully Against Minority Workers

Kaiser opened its Gramercy plant in 1958. 563 F.Supp. 224; 415 F.Supp. 764. At that time, by law and tradition, nearly all employment opportunities in the South were rigidly segregated. Kaiser does not appear to have violated tradition: in a

minority-initiated Title VII case, a unanimous court of appeals panel found that at Kaiser's plant in nearby Chalmette, Louisiana, "the physical facilities of the plant were rigidly segregated" prior to the effective date of Title VII. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378 (5th Cir. 1978).

Although segregation did not require denial of all employment to minorities, it did relegate minorities to the lowest paying, least desirable jobs. Skilled craft jobs were high paying, desirable jobs rarely if ever filled by minorities. At Kaiser's plant in Chalmette, minorities had been hired "only as laborers." Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378 (5th Cir. 1978).

Prior to the 1974 Labor Agreement, Kaiser did not hire skilled craft employees from among its incumbent unskilled workforce. Instead, it hired experienced craft workers from outside its plants. This was so at its Chalmette plant, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381 (5th Cir. 1978), and also at its Gramercy plant, 563 F.2d at 218,

231-232; 415 F.Supp. at 764.

In hiring skilled craft employees at its Gramercy plant, Kaiser used a purportedly neutral criterion which had a discriminatory effect.[3/] Prior to the 1974 Labor Agreement, Kaiser required craft applicants at its Gramercy plant to have prior craft experience. 563 F.2d at 218, 224, 231-232; 415 F.Supp. at 764. The discriminatory effect of this purportedly neutral practice resulted in a skilled craft workforce at Kaiser's' Gramercy plant which was only 2%-2 1/2% minority, 563 F.2d at 224; 415 F.Supp. at 764, in a community with a relevant labor force which was 39% minority, 563 F.2d at 222. Kaiser's maintenance of an identical prior craft experience requirement at its Chalmette plant had a

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3. The record here does not reflect whether discriminatory written tests and diploma requirements were used by Kaiser to select its craft workers at its Gramercy plant prior to 1974. But Kaiser probably used the same criteria as it did at its Chalmette plant where Kaiser regularly used discriminatory, unvalidated, and hence unlawful written tests and diploma requirements. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381 (5th Cir. 1978).

similarly severe discriminatory effect, a reality which led the Fifth Circuit to hold "that the [minority] plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect." Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1390 (5th Cir. 1978).

In view of these practices, Kaiser reasonably could have believed that it had discriminated unlawfully against minority workers. Griggs v. Duke Power Co., 401 U.S. 424 (1971); and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). "Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

Significantly, Kaiser's discriminatory employment practices not only were known to the OFCCP but they were the subject of findings and recommendations by the OFCCP in 1971, and of a further report by the OFCCP in 1973.

In the 1973 report, the OFCCP found that Kiaser had engaged in discrimination against minority workers by waiving its prior craft experience requirement for whites but not for minorities. This finding served to confirm the OFCCP's findings and recommendations rendered two years earlier.

In 1971, after a full-scale compliance review, the OFCCP rendered general findings of discrimination against Kaiser on the grounds that Kaiser's hiring of craft workers at the Gramercy plant discriminated against minorities in violation of the Executive Order. The OFCCP at that time recommended that Kaiser establish a training program in which 50% of the craft trainees would be minority workers.[4/]

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4. Although the 1971 findings and recommendations and the 1973 report were not made a part of the record in the district court, they have been lodged with the Clerk of this Court by petitioners United States and EEOC in No. 78-436.

In any event, the district court found that one of petitioner's "prime motivations" for adopting the one-to-one training ratio was "satisfying the requirements of the OFCC." 415 F.Supp. at 765; see also, 563 F.2d at 218.

B. Petitioners In Fact Were Confronted With A Prima Facie Case Of Unlawful Discrimination Against Minority Workers

Kaiser hired its Gramercy employees primarily from two parishes which together had a minority population of approximately 43% at the time of trial. 563 F.2d at 222 n.11, 228; 415 F.Supp. at 764. The labor market in those parishes was estimated to be 39% minority. 563 F.2d at 222 n.11, 228.

Kaiser's work force presented a totally different picture. At the time of trial, the Kaiser work force at its Gramercy plant was 14.8% minority. 563 F.2d at 224, 228; 415 F.Supp. at 764.

Kaiser's skilled work force in its craft positions was even more severely underrepresentative. Prior to the 1974 Labor Agreement, only 5 minority workers had been hired into those positions--resulting in a skilled work force which was only 2%-2 1/2% minority. 563 F.2d at 224; 415 F.Supp. at 764. In fact, Kaiser's skilled work force may have been only 1.7% minority. 563 F.2d at 228.

These statistics alone, for which petitioners were fully accountable, were and remain sufficient to create a prima facie case of discrimination. As this Court explained in Teamsters v. United States, 431 U.S. 324 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance often is a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring policies will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 339 n.20.

As in Teamsters, the statistics here established a prima facie case of discrimination. 431 U.S. at 337-343. See also, Dothard v. Rawlinson, 433 U.S. 321, 329-330 (1977) (the relevant labor market which was 36.9% female compared with employer's work force which was only 12.9% female established a prima facie case of discrimination).

Aware of its statistics, coupled with its discriminatory prior experience requirement, Kaiser was sitting on a prima facie case of discrimination at its Gramercy plant no different from that at its Chalmette plant. Compare the statistical prima facie case in Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378, 1389-1390 (5th Cir. 1978).

C. Petitioner's Employment Statistics Manifested A Severe Deficiency In Minority Worker Utilization

As a government contractor, Kaiser is bound by the requirements of Executive Order 11246 and the rules and regulations promulgated thereunder. Even without regard to Kaiser's past practices and its prima facie case of discrimination, Kaiser was required by §202 of Executive Order 11246 to "take affirmative action."

Evidence of affirmative action is manifested initially by the existence of an affirmative action program. As described in regulations promulgated by

the Secretary of Labor, an "affirmative action program is a set of specific and result oriented procedures." 41 C.F.R. §60-2.10. An essential part of an affirmative action program is the establishment of "goals and timetables" for positions in which the employer "is deficient in the utilization of minority groups and women." Id.

In order to establish their goals and timetables and their result oriented procedures to attain those goals and timetables, employers such as Kaiser are required to conduct a "utilization analysis," which includes both an analysis of the employer's work force and an analysis of labor force availability. 41 C.F.R. §60-2.11. Underutilization exists when the utilization analysis shows that the employer has "fewer minorities or women in a particular job than would be expected by their availability." Id. Underutilization of minorities, the Secretary of Labor has pointed out, is especially likely to exist in skilled craft jobs. Id.

A utilization analysis for skilled

craft jobs at Kaiser's Gramercy plant was quite simple to perform--especially in 1974 when the prior craft experience requirement was eliminated. A work force analysis would have revealed less than 2 1/2% minority representation in Kaiser's skilled crafts; the availability analysis would have revealed 39% minority worker availability. 563 F.2d at 224, 228; 415 F.Supp. at 764.

Given Kaiser's severe deficiency in its utilization of minority workers, it was required by Executive Order 11246 and the regulations thereunder to establish goals and timetables with specific result oriented procedures to attain its goals.

D. Petitioners Were Confronted With Possible Liability In A Minority Or EEOC Initiated Lawsuit, And With Possible Loss Of Lucrative Government Contracts Through Enforcement Of Executive Order 11246 By The OFCCP

Petitioners Kaiser and Steelworkers, with their reasonable belief that they had discriminated unlawfully against minority workers and with their prima facie case of unlawful discrimination,

were ready targets for a minority or EEOC initiated lawsuit under Title VII. Cf., Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). Given those facts and also given Kaiser's severe deficiency in utilization of minority workers, Kaiser also faced the very real possibility of OFCCP enforcement under Executive Order 11246.

Potential Title VII liability could hardly have been appealing to Kaiser and the Steelworkers. Rather than choosing to leave the seniority of their incumbent employees intact, they faced the possibility of a court-ordered restructuring of their seniority placement in order to provide rightful place seniority to all minorities who had been discriminated against. Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). And despite any asserted absence of discriminatory intent, they also could be held liable for class-wide back pay. Albemarle Paper Co. v. Moody, 422 U.S.

405 (1975).[6]

Kaiser's prospects under OFCCP enforcement of Executive Order 11246 were no more appealing. If Kaiser were found to be in noncompliance, the OFCCP under §209(a)(5) of the Executive Order could "cancel, terminate, suspend, or cause to be cancelled, terminated or suspended" all of Kaiser's current government contracts. If Kaiser were found to be a "nonresponsible" contractor, the OFCCP under §209(a)(6) of the Executive Order could require all federal agencies "to refrain from entering into contracts" with Kaiser.

These possibilities of Title VII liability and of OFCCP enforcement were

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6. In addition, of course, Kaiser faced the possibility of court-ordered goals and hiring ratios. See, Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972), both cited with approval in Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978)(opinion of Powell, J.). See also, Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978).

not fanciful to Kaiser and the Steelworkers. Two of Kaiser's Louisiana plants had already been sued by minority plaintiffs under Title VII.[7] And the OFCCP had already made findings of discrimination as to Kaiser's employment practices.[8] In view of these actions, as the majority of the court of appeals panel found, the training ratio set forth in "the collective bargaining agreement was entered into to avoid future litigation and to comply with threats of the Office of Federal Contract Compliance Programs [OFCCP] conditioning federal contracts on appropriate affirmative action." 563 F.2d at 218. See also, 415 F.Supp. at 765.

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7. The litigation against the Chalmette plant, commenced in 1967, is reviewed in Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). The litigation against Kaiser's plant in Baton Rouge, also commenced in 1967, was settled by a consent decree costing Kaiser $255,000 in class back pay, Burrell v. Kaiser Aluminum & Chemical Corp., Civ. No. 67-86 (M.D. La., consent decree filed Feb. 24, 1975).

8. See note 4, supra, and accompanying text.

E. Petitioners Were Aware Of The Government Negotiations With The Steel Industry Which Led To The Steel Industry Consent Decree

At the time that the Steelworkers union was negotiating its contract with Kaiser in late 1973 and early 1974, the union also was involved in the final stages of equal employment negotiations with nine major steel companies, the EEOC and the Department of Labor's OFCCP. When those negotiations were successfully completed, the United States (on behalf of the EEOC and the Department of Labor) filed suit to enforce Title VII and Executive Order 11246 against the nine major steel companies and the Steelworkers with regard to the employment practices at approximately 250 steel plants. On the same day suit was filed, April 4, 1974, the parties filed and a district court approved two consent decrees. See Steel Industry Consent Decree, BNA Fair Employment Practices Manual ["FEP"], 431:125-152 (1974), reviewed and approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

The Steel Industry Consent Decree contained a standard disclaimer of liability. BNA FEP 431:125-126.[9/] It required goals and timetables, and created a one-to-one, minority-to-white training ratio for each craft at each plant. BNA FEP 431:138-139.[10/] The price of enforced compliance

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9. In the introduction to the Consent Decree, the companies and union "expressly deny" any "failure to comply" with Title VII and E.O. 11246. BNA FEP 431:125. In the preamble, ¶B adds a similar disclaimer, stating that nothing in the decree "shall be construed to be, or shall be admissible in any proceeding as evidence of, an admission by defendants" of Title VII or E.O. 11246 violations. BNA FEP 431:126.

10. In ¶10 of the Decree, defendants agreed to implement goals and timetables for minorities and women in each trade and craft based upon a "utilization analysis of the craft jobs in each Trade and Craft" conducted pursuant to the OFCCP regulations in 41 C.F.R. Part 60-2 issued under Executive Order 11246. In order to meet the goals and timetables, defendants agreed in ¶10(d) to an "implementing ratio of 50%...for each Trade and Craft grouping at each plant, to the extent that qualified applicants from such groups are available within the plant, until the goals therefor have been achieved." In what is known as a seniority override, ¶10(e) provided: "In order to meet the implementing ratio, seniority factors shall be applied separately to each group for whom timetables are established and to all other employees." BNA FEP 431:138-139.

did not come cheap: the Consent Decree established a back pay fund for minority employees totaling more than $30 million. BNA FEP 431:143.

F. Aware Of These Facts, Petitioners Negotiated Their 1974 Labor Agreement Which Denied No Seniority Expectations Much Less Job Seniority To Incumbent White Employees But Which Instead Created New Employment Opportunities For Minority And White Incumbent Employees

In view of their past employment practices, in view of their prima facie case of unlawful discrimination against minority workers, in view of their deficiency in minority worker utilization, in view of potential liability to minorities in Title VII litigation and of possible additional enforcement of the Executive Order by OFCCP, and in view of the Steel Industry Consent Decree--in view of all of these factors--petitioners Kaiser and Steelworkers negotiated their 1974 Labor Agreement.

Neither in that agreement or apart from that agreement did they restructure seniority expectations by providing rightful place seniority to minority

employees, nor did they establish a back pay fund. Instead, they took another very important step in achieving voluntary compliance with Title VII and Executive Order 11246.

Petitioners Kaiser and the Steelworkers for the first time opened their craft training programs to incumbent employees. By this step, they sought to remedy their deficiency in minority worker utilization by establishing a one-to-one, minority-to-white training ratio. 563 F.2d at 222; 415 F.Supp. at 763. These provisions, identical to those in the Steel Industry Consent Decree, compare, BNA FEP 431:138-139, were "incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA." 563 F.2d at 229.

The 1974 Labor Agreement may have disappointed some long-passed over minority workers. But Kaiser and the Steelworkers undoubtedly believed that

they had well represented all of their employees, minority and white alike. They finally had provided an opportunity for minority entry into the skilled crafts. And they did so without upsetting seniority placement. "No white workers lost their jobs, none had expectations disappointed." 563 F.2d at 234. They were able to accomplish this through the creation of new training programs which provided new opportunities to minority and white incumbent employees. "None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement."[11/] 563 F.2d at 234.

The 1974 Labor Agreement marked an additional accomplishment for Kaiser and the Steelworkers. Without the time and

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11. During the one year that the new training opportunities existed at the Gramercy plant, before the program was enjoined by the district court, 12 incumbent employees (7 minority and 5 white) who had no chance to enter the skilled craft positions prior to 1974 were accepted for skilled craft training. 563 F.2d at 222-223; 415 F.Supp. at 764.

expense of another minority initiated lawsuit under Title VII, without the time and expense of an EEOC lawsuit under Title VII, without the time and expense of OFCCP enforcement proceedings under Executive Order 11246, and without the expenditure of judicial time and effort, Kaiser and the Steelworkers exemplified the ideals of pursuing voluntary compliance with the means and objectives of equal employment opportunity. Kaiser complied with its very specific obligations under the Executive Order. And Kaiser and the Steelworkers, based at a minimum upon the one-to-one training ratio in the Steel Industry Consent Decree, believed that they were complying with Title VII.

SUMMARY OF ARGUMENT

The race conscious training program for skilled craft positions, adopted by petitioners Kaiser and the Steelworkers at the same time that they opened these skilled craft positions for the first time to incumbent employees such as respondent Weber, represents a reasonable and lawful effort to remedy the near-total exclusion of minority workers from the skilled crafts while also providing new employment opportunities to incumbent white workers. This race conscious remedial effort does not contravene but instead is fully consistent with the language and objectives of Title VII and Executive Order 11246.

Despite superficial similarities to Regents of the University of California v. Bakke, 57 L.Ed.2d 750 (1978), this case has arisen on very different facts and in a quite distinct legal context. In Bakke, (1) the race conscious program was undertaken by a state entity bound by the Fourteenth Amendment; (2) implementation of the program defeated the

expectations of some white applicants who arguably were better qualified on paper than some of the minority applicants; and (3) adoption of the program was premised upon remedying societal discrimination against minorities and not upon the user's reasonable belief that it itself had engaged in unlawful past discrimination against minorities. The issue here is posed in a quite dissimilar context. Here, (1) the race conscious program was established by private parties encouraged to undertake such programs by Title VII and Executive Order 11246; (2) implementation of the program defeated no expectations of white workers, involved no claims that the white workers were more qualified than the minority workers, and in fact created new advancement opportunities for the white workers as well as for minority workers; and (3) adoption of the program was premised upon the users' reasonable belief that they had engaged in unlawful past discrimination against minorities.

A. Voluntary compliance with Title VII and Executive Order 11246 through the adoption of race conscious measures has been repeatedly recognized by the courts of appeals and by this Court as necessary "'to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). When an employer has a deficiency in minority worker utilization, and especially when there are reasonable grounds to believe that the employer has discriminated against minority workers in the past, Title VII not only permits but encourages voluntary compliance through the adoption of race conscious numerical measures which provide minority worker entry to the work place. In these same circumstances, Executive Order 11246 explicitly encourages the adoption of such race conscious numerical measures. In view of the fact that "[c]ooperation and voluntary compliance" are the "preferred means" of achieving

the remedial objectives of Title VII and the Executive Order, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), Title VII cannot be violated by a reasonably-based, race conscious numerical measure which is voluntarily adopted in order to accomplish those objectives.

B. The use of race conscious numerical measures, permissible under Title VII and explicitly encouraged under Executive Order 11246, has been ratified by Congress on three occasions in the past decade. (1) In 1969, Congress debated the legality of the race conscious numerical measures in the Philadelphia Plan and ultimately endorsed those measures as appropriate under Executive Order 11246 and Title VII. (2) In 1971-1972, during its consideration of the Equal Employment Opportunity Act of 1972, Congress forthrightly rejected one amendment in the House and two amendments in the Senate that would have prohibited the EEOC and the OFCCP from requiring race conscious numerical

measures. (3) More recently, in 1978, Congress again rejected amendments which would have barred federal agencies from requiring the adoption of race conscious numerical measures. Congress' explicit approval of race conscious numerical measures cannot be undermined by this Court.

C. Even if this Court repudiates the objectives of Title VII and Executive Order 11246 and rejects Congress' express ratification of the use of race conscious numerical measures, the court below erred in attempting to resolve the legality of the remedial measure without a meaningful adversary hearing. If judicially determined past discrimination is a necessary prerequisite to a race conscious remedial plan, the presence or absence of such discrimination cannot be determined without an adversarial contest. Given the interests of all the parties in the district court of denying the existence of actual unlawful discrimination, procedural fairness and Rule 19(a) F.R. C.P. required the joinder of the affected

minority workers as necessary parties. Additionally, given the traditional allocation of burdens of proof, respondent Weber, as plaintiff below, was required to prove the absence of unlawful discrimination against the minority workers. Neither procedure was followed by the district court. Thus, even under respondents' erroneous theory in this case, the district court's procedural errors require a reversal of the judgment below.

ARGUMENT

A. Petitioners' Race Conscious Training Program Does Not Unfairly Discriminate Against White Workers. Rather, It Serves The Moral And Legal End Of Remedying A Form Of Unjust Enrichment Caused By Reasonably Apprehended Racial Discrimination Against Minority Workers At Kaiser's Gramercy Plant

1. There Is An Interlocking Relationship Between Racial Discrimination Against Minorities, Unjust Enrichment For Whites And Race Conscious Remedial Plans

This Court has recognized that judicially imposed remedial plans aimed at eradicating the effects of unlawful racial discrimination by an employer may adversely affect white workers who did not participate directly in the discrimination.[12/]

12. A serious question exists in this case as to whether any white worker can be said to be adversely affected by the training program established by petitioners. Prior to the training program, no incumbent employee--black or white--was eligible for apprenticeship trade or craft training. Thus, the challenged program actually benefits the very incumbent white workers who challenge it. Cf., Beer v. United States, 425 U.S. 130 (1976) (reapportionment which incrementally improves status of black voters does not violate §5 of the Voting Rights Act). Moreover, it is clear that whatever seniority

E.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Albemarle Paper Company v. Moody, 422 U.S. 405 (1975). See also, Teamsters v. United States, 431 U.S. 324 (1977). In approving such

advantages incumbent white workers may have believed they possessed in gaining access to the training program, those advantages were subject to revision during the collective bargaining process.

Seniority rights are not vested in individual employees; rather, a collective bargaining representative may alter and even lessen seniority expectations of individual union members in order "to promote the long range social or economic welfare of those it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953). As Mr. Justice Burton wrote for a unanimous Court, there is no requirement for "a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees." Id.

While union bargaining representatives thus are free to alter seniority rights, they are duty-bound to represent not just the concerns of the white membership but also the interests of minority workers. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944). That representation, of course, may include corrective action. "There is nothing in the law which preclude[s] [a] union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). Similarly, there is nothing in the law which prohibits a union from representing its minority workers by negotiating an affirmative

remedies, this Court correctly assumed that the moral and legal legitimacy of a race conscious employment remedy rests upon the notion that it is designed to

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action override altering seniority expectations. E.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

When a union represents the interests of its black workers by negotiating an affirmative action override, the seniority expectations of some white workers undoubtedly will be affected. But changed expectations do not give rise to a viable complaint by a white worker. As the Court of Appeals for the Second Circuit recognized in Patterson v. Newspaper & Mail Deliverers' Union of New York, supra, the white worker "may well have been the modest beneficiary, vis-a-vis the minority work force, of a policy that discouraged minority persons from [obtaining employment]." 514 F.2d at 767. "In any event, it must be recognized that rights of the kind [that the white] workers here assert 'are not indefeasibly vested rights but mere expectations derived from a bargaining agreement and subject to modification.'" Id. (citation omitted).

In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the Court applied the foregoing principles in the context of our national policy of eliminating the effects of past discrimination.

> "This Court has long held that employee expectations arising from a seniority system agreement may not be modified by statutes furthering a strong public

redress the lingering effects of unlawful racial discrimination. Teamsters v. United States, 431 U.S. 324 (1977). The effect of racial discrimination which a remedial plan may legitimately seek to erase is not, however, confined solely to an estimate of the pecuniary loss suffered by the victims. Rather, it includes the identification and equitable allocation of unjust enrichment attributable to racial discrimination.

Given our fundamental assumption that people of all races are created

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> policy interest... The Court has also held that a collective bargaining agreement may go further, enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement... And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of 'the highest priority,' is certainly no less than in other areas of public policy interests." 424 U.S. at 778-779 (citations omitted).

equal, but for extraneous factors--chiefly race prejudice--the distribution of desirable jobs in an employment setting should, over time, approximate the racial composition of the surrounding community. Cf., Castaneda v. Partida, 430 U.S. 482 (1977). It is an unfortunate reality of American life that race prejudice has systematically hindered minorities from gaining access to desirable jobs in a wide variety of employment settings, especially in the skilled trades. The historical exclusion of minorities from access to an equitable share of desirable jobs has had a two-fold effect. First, it has consigned many to a life of privation and poverty. Second, and more importantly for the purposes of this case, it has often conferred an involuntary benefit upon even the most "innocent" of whites since, although the number of desirable jobs remains roughly constant, the elimination of minority workers as effective competitors results in a higher proportionate availability of desirable jobs for each white applicant. Thus, race prejudice on the job confers an often involuntary benefit upon even

those white workers who deplore racial discrimination.[13/]

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13. The unjust enrichment may be described as follows:

Let: a = total number of potential competitors of all races for desirable jobs in a given employment setting
b = available number of desirable jobs
c = individual allocation of desirable jobs which would result from allocation solely on basis of individual merit
x = members of racial minority removed from effective competition for desirable jobs by racial discrimination
y = individual allocation of desirable jobs which results from competition in absence of excluded minority applicants

$$\frac{b}{a} = c$$

$$\frac{b}{a-x} = y$$

$$y-c = z$$

z = unjust enrichment factor

The unjust enrichment impact of race prejudice is most graphically illustrated by the example of Major League baseball. Prior to Jackie Robinson's emergence, the fixed number of jobs on the 16 Major League rosters were held solely by whites because blacks were excluded from competing for them. As we now recognize, numerous black athletes would, if given the opportunity, have displaced white players from the rosters. The fact that the white players--even those wholly innocent of racial prejudice--retained jobs solely because blacks were excluded from competing for them is a graphic form of unjust enrichment.

The advantageous employment position enjoyed by a white worker which is ignored by a race conscious employment remedy is often just such an involuntary benefit caused by someone else's racial discrimination. As such, it is a legitimate target for a remedy which seeks to reconstruct the work force, over time, as if no racial discrimination had slowed its racial distribution. Cf., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Thus, in order to be justified, a race conscious employment remedy should either (1) seek to shift loss caused by racial discrimination to the guilty party[14]; or (2) seek to identify and equitably allocate the involuntary benefits (unjust enrichment) attributable to racial discrimination. Since no allegations exist that respondents here have themselves engaged in racial discrimination, the remedial numerical measure at issue in this case depends for its legitimacy upon a showing that it is aimed at identifying and remedying a form of unjust enrichment attributable to reasonably apprehended racial discrimination.

14. The grant of back pay in a Title VII case is the classic example of a loss shifting remedy.

At least three approaches exist to the problem. First, respondents' polar position argues that an employer and a union, confronted with allegations that their racial policies conferred an indirect benefit on white workers by increasing their access to craft jobs at the expense of minority workers, are powerless to evolve remedial plans aimed at redressing possible unjust enrichment --unless and until a court certifies that unlawful racial discrimination occurred at the plant in question.

The contrasting polar approach argues that Kaiser and the Steelworkers were free to recognize that racial discrimination practiced by third parties throughout society--including state and local governmental units in Louisiana--conferred an indirect benefit upon white workers seeking access to craft jobs justifying a reasonable remedial attempt to identify and reallocate the unjust enrichment.

Finally, an intermediate position urged by Amici argues that where an employer and a union reasonably apprehend that they may have engaged in unlawful racial practices, they may establish good faith voluntary plans to remedy the effects of such reasonably apprehended racial discrimination without waiting for governmental permission or exposing themselves to retrospective liability. Cf., United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (race conscious reapportionment valid because intended to redress effect of reasonably apprehended violation of §5 of Voting Rights Act).

2. Private Parties May Adopt Remedial Plans Aimed At Redressing The Effects Of Reasonably Apprehended Racial Discrimination In Employment Without Awaiting Governmental Permission Or Exposing Themselves To Retrospective Liability

a. Law And Logic Encourage Adoption Of Remedial Plans

So long as private parties are confronted with a reasonable basis for

fearing that they may have engaged in unlawful racial discrimination in employment, they should be encouraged to adopt voluntary remedial plans designed to remedy the effects of reasonably apprehended racial discrimination.[15] Respondents appear to argue that a standard of reasonable belief of past discrimination as a justification for a private remedial plan is insufficiently high; they argue that only a judicial certification of the occurrence of unlawful past racial discrimination renders its existence sufficiently certain to justify a race conscious remedy. Thus, they argue, private parties wishing to evolve a remedy for the effects of past discrimination in which they reasonably fear they may have engaged must first be found guilty of unlawful discrimination in a judicial forum.

Any requirement for a judicial

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15. The preference for voluntary compliance contained in Title VII and Executive Order 11246 is discussed at pp. 49-55, infra.

finding of guilt in order to validate a private plan would all but preclude private persons beset with a reasonable fear of having violated the law from embarking upon a course of voluntary remedial activity, since the judicial finding of guilt would collaterally estop the party from defending subsequent actions designed to impose financial liability for the past discrimination. Parklane Hosiery Company, Inc. v. Shore, 47 U.S.L.W. 4079 (Jan. 9, 1979) (U.S. No. 77-1305). Respondents' refusal to permit private persons to remedy the effects of reasonably apprehended racial discrimination without exposing themselves to massive liability runs counter to settled jurisprudential norms. In a wide variety of settings, when persons fear that they may have violated the law, our system encourages voluntary remedial action in a procedural context which does not expose the party to retrospective liability. Thus, corporations accused of anti-trust violations are routinely encouraged to adopt remedial measures without admitting guilt or exposing themselves to retrospective

liability. E.g., Burbank v. General Electric Co., 329 F.2d 825, 834-835 (9th Cir. 1964); Triangle Industries, Inc. v. Kennicott Copper Corp., 402 F.Supp. 210 (S.D.N.Y. 1975). Persons accused of violating the nation's securities laws are encouraged to engage in private remedial action without exposing themselves to massive liability. E.g., Allegheny Corp. v. Kirby, 333 F.2d 327 (2d Cir. 1964), aff'd by an equally divided court en banc, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). Similarly, persons accused of patent infringement,[16] tortious conduct,[17] and admiralty law violations[18] are routinely encouraged to engage in private remedial action without requiring an admission of culpability. It is, Amici submit, fully

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16. E.g., Kaspar Wireworks, Inc. v. Leico Engineering & Mach. Inc., 575 F.2d 530 (5th Cir. 1978); Sampson v. Radio Corp. of America, 434 F.2d 315 (2d Cir. 1970).

17. E.g., Bratt v. Western Airlines, 169 F.2d 214 (9th Cir. 1948), cert. denied, 335 U.S. 886 (19).

18. Sun Oil Co. v. Govoster, 474 F.2d 1048 (2d Cir. 1973); Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500 (2d Cir. 1972).

as important to encourage corporations to embark on a policy of remedying reasonably apprehended racial discrimination in employment as it is to encourage compliance with the nation's anti-trust, securities, patent, tort and admiralty laws. Just as it would be folly to require a judicial finding of guilt prior to permitting private remedial actions in an anti-trust or securities context, so is it inconsistent with our national commitment to the eradication of racial discrimination to lock persons onto the consequences of past discriminatory activity because the price of adopting a voluntary remedial plan is exposure to massive liability. See, United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144 (1977) (good faith intent to avoid violating §5 of the Voting Rights Act justifies race conscious reapportionment).

b. On The Facts Here, There Are No Risks In The Private Adoption Of Remedial Plans

Respondents argue that permitting private parties to establish remedial

plans to remedy "reasonably apprehended" racial discrimination creates an unacceptably high risk of unfair treatment of white workers. However, in the context of the present case, the risk of a bad faith private plan is non-existent. First, the private plan at issue in this case was not promulgated unilaterally, but was the result of an arms' length negotiation between entities of equal bargaining capacity. Second, one of the parties to the negotiation--the Steelworkers union--is charged with the duty of fair representation of all workers at the Gramercy plant--white and minority. E.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Hoffman, 345 U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335 (1964). Third, a reasonable basis existed for fearing that unlawful racial discrimination may have taken place at both the Gramercy and Chalmette plants. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). Where, as here, such safeguards are present, no basis exists for refusing to encourage

voluntary compliance with the law. Where reasonable grounds exist to fear that past racial discrimination has infected the hiring process and where the remedial plan is embodied in a bona fide collective bargaining agreement, sufficient safeguards exist to encourage the private adoption of remedial plans without requiring a formal adjudication of guilt.

3. Voluntary Adoption Of Race Conscious Measures Is Consistent With And Specifically Encouraged By Executive Order 11246 And Title VII

While voluntary compliance is necessary in all areas of law, voluntary compliance with the objectives of employment discrimination law has been especially stressed as necessary "'to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). Without voluntary compliance, we as a nation will be unable even to approach

our objective "of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority.'" Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976).

a. Executive Order 11246 And Title VII Encourage Voluntary Compliance

The emphasis on voluntary compliance with Title VII and Executive Order 11246 is subsumed within the structure of the statute and the Order. But carrot and stick incentives for compliance also are provided. Under Title VII, the "'spur or catalyst'" for voluntary compliance is "the reasonably certain prospect" of a class-wide back pay award against an employer or union under §706(g), 42 U.S. C. §2000e-5(g). Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). Under the Executive Order, an even greater incentive to an employer is the likelihood that its lucrative government contracts may be "cancelled, terminated or suspended," and that it will be debarred from

receiving future government contracts. See Executive Order 11246, §§209(a)(5) & (6).

Even without these specific incentives/sanctions, voluntary compliance nonetheless is an explicit and implicit objective--an objective most readily apparent from the statutory structure of Title VII. Section 706(b), 42 U.S.C. §2000e-5(b), requires the EEOC to "endeavor to eliminate" discrimination through "informal methods of conference, conciliation and persuasion." This statutory emphasis on informal methods has caused this Court to state on several occasions that "cooperation and voluntary compliance were selected as the preferred means for achieving [compliance with Title VII]." (emphasis added); quoted with approval in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367-368 (1977).

The courts of appeals (especially the U.S. Court of Appeals for the Fifth Circuit which has a considerable docket of employment discrimination cases) have

been no less aware of this emphasis on voluntary compliance: Title VII encourages "adjustment and settlement...short of litigation," Guerra v. Manchester Terminal Corp., 498 F.2d 641, 650 (5th Cir. 1974) (per Judge Goldberg); Title VII places "great emphasis upon private settlement and the elimination of unfair practices without litigation on the ground that voluntary compliance is preferable to court action," Hutchings v. United States Industries, Inc., 428 F.2d 303, 309 (5th Cir. 1970) (per Judge Ainsworth); "the central theme of Title VII is 'private settlement' as an effective end to employment discrimination," Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (per Judge Tuttle); Title VII has as a "primary goal the securing of voluntary compliance with the law," Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (per Judge Kerner); "voluntary compliance is preferable to court action," Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402

(5th Cir. 1969) (per Judge Coleman); it should be "clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation," Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968) (per Judge Bell).

Aside from being an important legal objective, voluntary compliance has an important practical side: it reduces the need for expanding federal agency enforcement machinery and it of course reduces the expenditure of enormous amounts of agency and judicial time. This is especially true where voluntary compliance incorporating broadly-based race conscious numerical measures is undertaken by a large employer, much less by an entire industry as was the case in the Steel Industry Consent Decree, BNA FEP 431:125-152 (1974), reviewed and approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). There, the court discussed in some detail the

practical side of why Title VII "places a premium on the achievement of voluntary compliance" through the adoption of race conscious numerical measures. 517 F.2d at 846. One obvious practical reason for the emphasis on voluntary compliance, the court noted, is that,

> "the EEOC's limited resources permit it to undertake serious conciliation or lawsuits in only a small fraction of the cases on its docket." 517 F.2d at 848.

Without considerable deference for voluntary compliance, our nation's

> "losses which must be considered include the nation's investment in the resources consumed by the federal agencies...as well as the chance justly to finalize a matter that otherwise would burden agencies and courts... for years to come." 517 F.2d at 851.

The burdens on the agencies and on the courts, without deference to voluntary compliance, indeed would be considerable. In fact, without the voluntary compliance achieved in the Steel Industry Consent

Decree (involving nine major employers, one union, and 250 plants), the court estimated that full litigation of the matter would have required "ten years to try just the liability issues" followed by trial of the remedial issues involving "over twenty-eight years of trial time." 517 F.2d at 851 n.28 (emphasis in original).

Ultimately, voluntary compliance is the preferred method of enforcement, especially where the voluntary compliance includes numerical measures providing minority entry into an employer's work force, for the simple reason that it furthers the objectives of Title VII and of Executive Order 11246. As the court stated in Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976) (upholding a voluntary compliance plan with numerical goals and timetables):

> "the clear policy in favor of encouraging settlements must... be taken into account particularly in an area where voluntary

> compliance by the parties over an extended period will contribute significantly toward ultimate achievement of Title VII's statutory goals." 514 F.2d at 771.

b. Compliance With Executive Order 11246 And Title VII Includes Adoption Of Race Conscious Measures

Voluntary compliance directed toward "ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,'" Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976) (citations omitted), includes and often requires the adoption of race conscious numerical measures. These numerical measures, adopted under Title VII and Executive Order 11246, have been widely pursued and judicially approved: (1) when premised upon findings of identifiable past discrimination; (2) when premised not upon identified discrimination but rather only upon underutilization of minority workers; and (3) when adopted in good faith with express disclaimers of any past discrimination.

These prospective race conscious measures which provide work place entry to minority workers, are fully consistent with the remedial objectives of Title VII and Executive Order 11246.

By 1964, Congress was well aware of the vastly unequal economic and social conditions imposed upon minorities in the work place by our society's pervasive racism. By enacting Title VII in 1964, and by extending it in 1972, Congress broadly sanctioned remedial efforts to change those unequal conditions. While it is true that Congress in 1964 did not require employers and unions to adopt affirmative race conscious numerical measures, neither did Congress prohibit adoption of such measures[17]; eight years

17. Section 703(j), 42 U.S.C. §2000e-2(j), at various times has been asserted as a prohibition against the use of race conscious numerical measures. But §703(j) on its face is not a prohibition but only a disclaimer that nothing in Title VII "shall require...preferential treatment...on account of an imbalance." 42 U.S.C. §2000e-2(j) (emphasis added). The unanimous interpretation of §703(j) by the courts of appeals

later, Congress did give its specific approval to the use of such numerical measures.[18] Being sidetracked here by the use of numerical measures, however, misses the point. For, what is significant is Title VII's objective of remedying societal discrimination.

Title VII, as this Court has repeatedly made clear, prohibits not

has been that the section has no effect upon race conscious numerical measures, whether ordered to remedy past discrimination, e.g., United States v. International Union of Elevator Constructors, 538 F.2d 1012 (3d Cir. 1976) (and cases cited therein), or whether adopted simply to remedy underutilization of minority workers, e.g., Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

Nonetheless, §703(j) continues to be raised at various times. In fact, respondent Weber relied on §703(j) in the court of appeals below. His argument was rejected out of hand by the panel majority for the obvious reason that "the issue" was "not whether preferential treatment is required but whether it is forbidden." 563 F.2d at 219.

18. Regardless of the meaning of §703(j) in 1964, Congress in 1971-1972 expressly adopted the use of race conscious numerical measures under Executive Order 11246 as not inconsistent with Title VII. This 1971-1972 legislative history of Title VII is set forth in some detail in Point B, infra.

only an employer's own intentionally discriminatory practices but also employment practices which merely inhibit minority participation because of societal discrimination. For example, when an employer uses a written test, a diploma requirement, or a prior experience requirement which has a discriminatory impact, the employer is merely perpetuating the inequalities created by centuries of discrimination. It is not the employer which necessarily denied the minority applicant test-taking ability, a diploma, or prior experience. Nonetheless, Title VII prohibits the employer's use of such criteria unless the employer can show that they are justified by a business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). This remedial burden is required regardless of the employer's culpability in order to remedy the continuing effects of pervasive societal discrimination. Id. And, when the business necessity burden cannot be met, as it most often cannot, the employer may continue its use of the

criteria only if it remedially adjusts the requirements so as to eliminate the discriminatory effect of the criteria. Albemarle Paper Co. v. Moody, 422 U.S. 405, 435 (1975).[19] This remedial

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19. The Court's approval of this remedy in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), was emphasized by Mr. Justice Brennan in Regents of the University of California v. Bakke, 57 L. Ed.2d 750 (1978):

> "In Albemarle, we approved 'differential validation' of employment tests. See 422 U.S., at 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in 'potential for employment' to a 60 for whites, the test could not be used consistent with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices." 57 L.Ed.2d at 817 n.37 (opinion of Brennan, J.).

See also, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.14B(8)(d).

action, again, is required not because of the employer's culpability--although there is a causal connection--but as a remedy for the continuing effects of our pervasive past discrimination.[20]

The intent and effect of Executive Order 11246 in reaching and remedying societal discrimination is equally if not more apparent--for §202 of the Order

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20. As Justice Powell pointed out in Regents of the University of California v. Bakke, 57 L.Ed. 2d 750 (1978), the congressional findings supporting the enactment of Title VII distinguish the remedial measure here from that at issue in Bakke:

> "[T]he presumption in Griggs--that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute--was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.... See, e.g., H.R. Rep. No. 914, 88th Cong., 2d Sess., at 26 (1963) ('Testimony concerning the fact of discrimination in employment is overwhelming')." 57 L.Ed.2d at 783 n.44 (opinion of Powell, J.).

both prohibits "discrimination" and requires "affirmative action," both of which have been interpreted by the Secretary of Labor to require race conscious goals and timetables where there is a deficiency in the utilization of minority workers. 41 C.F.R. Part 60-2. The premise for these requirements is the same as the source for the Executive Order: the procurement authority given to the President by Congress in Titles 40 and 41 of the United States Code. Under this broad grant of authority, the President properly concluded in issuing Executive Order 11246 that it was in the best interests of the United States to insure that its suppliers of goods and services did not indirectly or directly increase costs by perpetuating our exclusion of available minority workers from the active labor pool. See Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 170-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971); see also, United States v. New Orleans Public Service, Inc., 553 F.2d

459, 465-468 (5th Cir. 1977); Rossetti Contracting Company, Inc. v. Brennan, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975); Northeast Construction Company v. Romney, 485 F.2d 752, 760-761 (D.C. Cir. 1973).

Because of the Title VII and Executive Order objectives of remedying our nation's pervasive discrimination against minorities, the remedial measures of necessity have included a wide variety of race conscious measures designed to bring the victims of our discrimination into the work place: e.g., monitoring and adjusting scores on purportedly neutral criteria to insure against racially discriminatory impact; engaging in minority-oriented recruitment; establishing training programs for minority trainees; and implementing numerical measures to insure minority participation in an employer's work force.

Not all of these race conscious measures are always necessary for voluntary compliance with Title VII and Executive Order 11246. Nonetheless, each may be appropriate depending, of

course, upon the employer's past practices and deficiency in minority utilization. See, 29 C.F.R. Part 1608 (EEOC Guidelines on Affirmative Action); 41 C.F.R. Part 60-2 (Revised Order No. 4: Affirmative Action Programs for Government Contractors).

Although they are the most controversial of the remedies, race conscious numerical measures providing work place entry to victims of our nation's discrimination have been widely approved as consistent with the remedial objectives of Title VII and Executive Order 11246. As we noted earlier:

(1) Race conscious numerical measures frequently have been premised upon findings of identifiable past discrimination. In Regents of the University of California v. Bakke, 57 L.Ed. 2d 750, 778 (1978) (opinion of Powell, J.), two of the cases cited with approval were Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert.

denied, 406 U.S. 950 (1972). In Bridgeport, the court-ordered numerical measure established a minority hiring goal, required future minority applicants to be placed in a separate minority pool, required 50% of the next ten vacancies to be filled from the minority pool, required 75% of the next twenty vacancies to be filled from the minority pool, and required 50% of the vacancies thereafter to be filled from the minority pool until the goal was reached. In Carter, the court-ordered measure also established a minority hiring goal and required 33% of the future hires to be minority until the goal was attained. In both situations, the numerical measures provided work place entry to minority workers who were victims of societal discrimination but who had not necessarily been discriminated against personally by the employers. See also, Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978), a post-Bakke[21/]

21. In Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978), the Fifth Circuit correctly viewed Bakke as not affecting court-ordered remedies:

decision approving a race conscious numerical measure similar to those in Bridgeport and Carter.[22/]

> "The Bakke decision should not be viewed as a contrary decision of law applicable to the issue of the constitutionality of affirmative hiring relief, but as a decision reaffirming the equitable power of federal courts to remedy the effects of unconstitutional acts through race-conscious means." 480 F.2d at 1284.

22. The courts of appeals in nine circuits have ordered or approved similar numerical measures providing work place entry to minority workers who were victims not of the employers' direct discrimination but of societal discrimination, e.g.:

FIRST CIRCUIT: Associated General Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975);

SECOND CIRCUIT: Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973);

THIRD CIRCUIT: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974);

(2) Race conscious numerical measures frequently have been premised not upon identified discrimination but

Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971);

FOURTH CIRCUIT: Sherill v. J.P. Stevens & Co., 551 F.2d 308 (4th Cir. 1977);

FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969);

SIXTH CIRCUIT: EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970);

SEVENTH CIRCUIT: United States v. Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972);

EIGHTH CIRCUIT: United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972);

NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

rather only upon underutilization of minority workers. In Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978) (opinion of Powell, J.), two of the cases cited with approval were Associated General Contractors of Massachusetts v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); and Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971). In both situations, the numerical measures administratively imposed upon employers provided work place entry to minority victims of societal discrimination. To a certain extent, of course, there had been past racial discrimination by the building trades, but the numerical measures were premised only upon underutilization,[23] and the measures in any event were imposed not on the building trades but on the employers.

23. Although there has been past discrimination in the building trades, the legality of administratively imposed numerical measures providing

(3) Race conscious numerical measures frequently have been adopted

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craft jobs for minority workers has been premised not upon findings of past discrimination but rather upon determinations of minority underrepresentation. In Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), the court held that statistical evidence "revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified the issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177. A similar decision was reached in Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where the court upheld a numerical hiring measure which had been imposed under a state executive order designed not to remedy past discrimination but only to redress minority underrepresentation. 490 F.2d at 13, 14 & 19. Gratuitously, if not as an afterthought, the court of appeals observed "that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21.

Similar decisions have upheld the 10% set aside for minority business enterprises in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), despite the fact

with express disclaimers of any past discrimination. In these situations, as in the previous category, the numerical measures brought into the employers' work forces minority workers who were victims of societal discrimination but not of any specifically identified discrimination. In Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977), this Court, while defining the parameters of retroactive relief under Title VII, gave tacit approval to a prospective numerical measure establishing a minority hiring goal and a one-to-one, minority-to-white implementation ratio.[24] Similar prospective numerical measures, with similar

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that the 10% set aside was premised not on findings of past discrimination but only upon statistical evidence of minority enterprise underrepresentation. For example, in the first post-Bakke decision on the 10% set aside, the Court of Appeals for the Second Circuit upheld the 10% set aside as constitutional while observing that "the absence of such a finding of past discrimination in the legislative history is not determinative." Fullilove v. Kreps, 584 F.2d 600, 606 (2d Cir. 1978).

24. The Teamsters Court commented upon the appropriateness of agreeing to prospective compliance under Title VII:

goals and ratios, were voluntarily

> "The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of §707(a) of Title VII eliminate their discriminatory practices and the effect therefrom. See, e.g., cases cited in n.51, infra. In this case prospective relief was incorporated in the parties' consent decree. See, supra, at 330-1, n.4." 431 U.S. at 361 n.47.

The voluntarily adopted consent decree referred to by the Court included a broad numerical measure providing work place entry to minority workers:

> "The decree further provided that job vacancies at any company terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal." 431 U.S. at 330-331 n.4.

adopted and later upheld in EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 57 L.Ed.2d 1161 (1978); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Patterson v. Newspaper & Mail Deliverers Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).[25/]

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25. For additional prospective numerical measures contained in voluntary agreements, see, e.g.:

Howard v. Freedman, Civ. No. 74-234 (W.D. N.Y., May 12, 1975) (consent decree establishing a 25% minority hiring goal and a hiring ratio of two minority hires for every three white hires), collateral challenge by whites rejected, Prate v. Freedman, 430 F.Supp. 1373 (W.D.N.Y. 1977), aff'd without opinion, (2d Cir., Oct. 17, 1977), cert. denied, 98 S.Ct. 2274 (1978); see also, Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978) (attorneys fees awarded to minority defendant-intervenors because the collateral challenge was vexatious and unreasonable).

Bolden v. Pennsylvania State Police, C.A. No. 73-2604 (E.D.Pa. June 21, 1974) (consent decree establishing a 9.2% minority hiring goal and a hiring ratio of one minority hire for every two white hires), preliminary injunction on collateral challenge by whites denied, Oburn v. Shapp, 393 F.Supp. 561 (E.D. Pa. 1975),

In each of the foregoing voluntary agreements, prospective numerical measures were deemed necessary for prospective Title VII compliance although past discrimination was expressly denied in each instance. Illustrative is the Steel Industry Consent Decree, which contained two express disclaimers of past discrimination[26/] and which received the judicial recognition in Allegheny-Ludlum that, "[h]ere, of course, we have no judicial finding of unlawful employment discrimination." 517 F.2d at 881 (emphasis in original).

Title VII and Executive Order 11246 place a premium on voluntary compliance with their explicit and implicit remedial objectives. As court after court has concluded, prospective race conscious numerical measures while not necessarily required for voluntary compliance certainly are a considerable portion of the voluntary compliance encouraged by and lawful under Title VII and the Executive Order.

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aff'd, 521 F.2d 142 (3d Cir. 1975), collateral challenge dismissed, 70 F.R.D. 549 (E.D. Pa. 1976), aff'd , 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

United States v. Wood, Wire & Metal Lathers, Int'l Union, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (consent decree pursuant to which the union was required initially to issue work permits to 100 minority workers, and thereafter for each of the next four years to issue at least 250 work permits on a one-to-one ratio alternatively to one minority worker and to one white worker).

26. See p. 23, supra.

B. Voluntary Adoption Of Race Conscious Measures Under Executive Order 11246 And Under Title VII Has Been Approved Repeatedly By Congress

The significant objectives of Title VII and Executive Order 11246, of encouraging voluntary adoption of race conscious numerical measures which provide work place entry to minority workers, form an integral part of Title VII and the Executive Order. As apparent as these objectives are on the face of and from the uniform interpretation of Title VII and the Executive Order, equally significant is Congress' express ratification of the use of race conscious numerical measures under Title VII and the Executive Order. This ratification--which occurred not just once but on three separate occasions in 1969, in 1971-1972, and in 1978--conclusively establishes the legality of voluntary race conscious numerical measures[27] and further establishes the

27. Far less legislative history has in the past been relied on to interpret provisions of Title VII. For example, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court agreed with the unanimity of courts of appeals' decisions holding that back pay "may be awarded on a

absence of any conflict between Title VII and the Executive Order.

1. In 1969, Congress Ratified The Use Of Race Conscious Measures Under Executive Order 11246

Shortly after the Philadelphia Plan, with its race conscious numerical goals and timetables, was imposed upon construction contractors in Philadelphia by the Department of Labor under Executive Order 11246,[28] debate arose between the Executive Branch and Congress about the legality of

class basis under Title VII without exhaustion of administrative procedures by the unnamed class members." 422 U.S. at 414 n.8. In reaching this decision, the Court reviewed the 1972 legislative history of Title VII which revealed that the House bill had sought to limit back pay awards only to individuals who had filed charges, that the Senate bill contained no such limitation, and that the Senate version prevailed in the House-Senate conference and was enacted into law. Id. Based upon this legislative history, the Albemarle Court held that back pay could be awarded to unnamed members of the class. As Justice Stewart stated, writing for the Court: "The Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972." Id.

28. For a discussion of the Philadelphia Plan, see Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).; see also, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L. Rev. 723 (1972).

the Plan. As a result of congressional actions flowing from that debate, Congress ratified the use of race conscious goals and timetables.

Administrative debate on this issue was initiated when the Comptroller General, objecting to the goals and timetables of the Philadelphia Plan, issued an opinion finding the Plan to be in violation of Title VII and refusing to approve expenditures on construction projects covered by it. 49 Comp. Gen. 59 (1969). Immediately thereafter, the Attorney General controverted the view held by the Comptroller General, issued an opinion declaring the Plan to be legal, and advised the Secretary of Labor to disregard the Comptroller General's opinion. 42 Op. Att'y Gen. No. 37 (Sept. 27, 1969).

The Comptroller General responded by urging the Senate Subcommittee on Deficiencies and Supplementals to include in a pending supplemental appropriations bill a limitation on the use of federal funds for contractors required to meet any specific goals established for

minority workers. 115 Cong. Rec. 40018-40019 (1969). At the request of Senator Fannin, the Subcommittee followed the Comptroller General's suggestion and attached the following rider:

> "No part of the funds appropriated or otherwise made available by this or any other act shall be available to finance, either directly or through any federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any federal statute." 115 Cong. Rec. 40013 (1969).

During this same period, Senator Ervin, as Chairman of the Senate Subcommittee on Separation of Powers, held hearings to determine if the revised Philadelphia Plan violated the separation of powers by contravening the intent of Congress in the Civil Rights Act of 1964. The testimony before Ervin's subcommittee, principally that of Comptroller General Staats, later was introduced into the Congressional Record during the Senate debate on the Fannin rider. 115 Cong. Rec. 16799-16802 (1969). See also, 115

Cong. Rec. 16729-16733 (1969).

Senate debate on the Fannin rider revolved around two issues. Several senators were of the view that the primary issue was maintaining the independence of the Comptroller General's office free from Executive Branch interference. See, e.g., Remarks of Senator Allott at 115 Cong. Rec. 39963 (1969). Other senators believed that the only issue was the legality of race conscious goals and timetables. To Senator Hruska, for example, the intent of Congress in debating the Fannin rider was unmistakable:

> "The fact is that not only the Philadelphia Plan is involved. A similar series of contracts is being negotiated and very likely will soon be in effect in Boston and some seven, eight cities. Mr. President, that presents quite a problem. Being aware of that problem and having the question before us as to where this authority and those contracts are entered into, then the question will be raised when the time comes to debate the legality of these plans. Did not the Congress acquiesce in a practice along that line...the Congress knew what was

> going on and yet raised no objection. In view of these considerations, I think that this bill is a legitimate vehicle for saying this is the time and place to confront the issue." 115 Cong. Rec. 39961 (1969).

Any ambiguity as to whether the Senate was addressing the dispute between the Comptroller General and the Attorney General was removed when the Senate rejected amendments to the Fannin rider that would have limited its effect only to resolving that dispute. 115 Cong. Rec. 39973 (1969). With the issue then focused solely on the legality of race conscious goals and timetables, the Senate passed the Fannin rider 74-0 with 26 abstentions.

When the bill, with the Fannin rider attached, reached the House, most of the debate focused on the use of race concious goals and timetables. Among the opponents of the Fannin rider in the House was Representative Gerald Ford. In his remarks, he vigorously supported the legality of the goals and timetables as authorized by earlier civil rights legislation:

"In the early 1950's and in the 1960's the Congress passed far-reaching civil rights legislation involving social rights...protecting the rights of minorities--open housing and other rather sweeping legislation to protect people against discrimination because of race, creed, and color.

"Now let me say this: All of those social rights are important, but if you do not have a job, it does not do you much good in some of these cases. If you do not have a job to earn the money to buy a house, then open housing legislation does not do you one bit of good. If you do not have a job to earn a living for your family, it does not do you any good in many of these other areas, many of the other areas where Congress has given protection against discrimination.

"This rider prevents minority groups from getting a job in a meaningful way. This rider precludes the opportunity for job equality under Federal contracts. Make no mistake about that.... An 'aye' vote is going to mean you vote to perpetuate job discrimination in Federal contracts. A 'nay' vote means that individuals will have the protection of the Federal Government in getting jobs. Minority groups will have an opportunity to earn a living so that they can enjoy the fruits of social legislation which the Congress has passed

in the last two decades." 115 Cong. Rec. 40907 (1969).

After vigorous debate, the House deleted the rider by a vote of 208 to 156. 115 Cong. Rec. 40921 (1969). Upon reconsideration in the Senate, the Senate by a vote of 39-29 also voted to delete the Fannin rider. 115 Cong. Rec. 40749 (1969).

Although both the Senate and House debates on the Fannin rider were somewhat confused because of the separation of powers issue, there is no doubt that Congress was well aware of the race conscious goals and timetables in the Philadelphia Plan. As Senator Hruska emphasized: "Congress knew what was going on and yet raised no objection." 115 Cong. Rec. 39961 (1969).

2. In 1971-1972, Congress Again Ratified The Use Of Race Conscious Measures Under Executive Order 11246 And Incorporated The Order Into Title VII

The next debates in Congress on the appropriateness of race conscious numeri-

cal measures occurred in 1971-1972 during Congress' consideration of the Equal Employment Opportunity Act of 1972, the bill which extended and considerably strengthened Title VII. As this Court pointed out in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), the "dominant Title VII battle in the 92nd Congress was over what kind of additional enforcement power should be granted to the EEOC." 432 U.S. at 361. Since part of that battle concerned the potential transfer of Executive Order enforcement powers to the EEOC, there was considerable debate on the appropriateness of race conscious numerical measures. As a result of Congress' focus on this issue, Congress reaffirmed the legality of race conscious numerical measures not only under Executive Order 11246 but also under Title VII.

Debate in the House on H.R. 1746 centered upon an amendment offered by Representative Dent which would have prohibited the EEOC, with its proposed Executive Order enforcement powers, "from imposing or requiring a quota or

preferential treatment with respect to numbers of employees of any race, color, religion, sex or national origin." 117 Cong. Rec. 31784, 31981, 31984 (1971).

In a colloquy with Representative Pucinski, Representative Dent explained the purposes of his amendment:

> Mr. PUCINSKI. Mr. Chairman, I take this time to ask the chairman of the subcommittee a question for the purpose of establishing some legislative history here.
>
> He will offer an amendment which will provide that the Commission shall be prohibited from requiring a quota for preferential treatment with respect to the numbers of employees or percentages of employees of any class, color, religion, sex, or national origin.
>
> I am puzzled and troubled with the word "quota," because in the Philadelphia Plan the administration had very stubbornly insisted, and there was extensive debate on the floor of the House here, that they were not using quotas in Philadelphia but they were using "goals." What I want to know is whether or not the use of the word "quota" here in this amendment applies to "goals" or any other phraseology which in effect would require an employer to employ a certain amount of people of various racial and ethnic categories mentioned here.

Mr. DENT. The gentleman asked me the question yesterday, and I looked up the word "goals" and I cannot find where goals has any specific meaning that would lend it to any plan which would say a certain number or quota. The word "quota" is a very plain word.

Mr. PUCINSKI. Does the prohibition against "quota" in this amendment apply to "goals" or to any other method or scheme used by the administrators of this act?

Mr. DENT. I would say the word "quota" and the prohibition of quotas in the Commissions' administration of the Federal contract compliance program means exactly what it is intended to mean, that under any condition this Commission cannot establish a set number or quota of workers in any category that must be present.

Mr. PUCINSKI. If they plead as they did in the case of the Philadelphia plan that they were not establishing quotas but merely establishing goals, this would be interpreted as meaning they are in violation of this act.

Mr. DENT. That is right, if what they are establishing is a quota or preferential treatment.

117 Cong. Rec. 31975 (1971).

Following further debate, Representative Erlenborn introduced a substitute amendment maintaining the status quo. Representative Dent objected:

> "The Erlenborn amendment leaves things exactly as they are.
>
> "We say in my amendment that it was the intent of Congress that there should be no quotas and that there should be no preferential treatment. In our amendments we specifically prohibit the use of quotas. We prohibit the establishment of preferential treatment." 117 Cong. Rec. 32089 (1971).

The Erlenborn substitute was adopted and the Dent amendment rejected. 117 Cong. Rec. 32111-32112 (1971).

Debate and action in the Senate, even more conclusive than that in the House, centered upon two proposed amendments offered by Senator Ervin to S.2515. Both amendments, which would have gutted the permissible use of numerical measures, were rejected. The first amendment offered by Senator Ervin stated:

> "No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by

employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges. If any department, agency, officer, or employee of the United States violates or attempts or threatens to violate the provisions of the preceding sentence, the employer or employee aggrieved by the violation, or attempted or threatened violation, may bring a civil action in the United States District Court in the District in which he resides or in which the violation occurred, or is attempted or threatened, or which the enterprise affected is located, and the District Court shall grant him such relief by way of temporary interlocutory or permanent injunctions as may be necessary to redress the consequences of the violation, or to prevent the attempted or threatened violation." 118 Cong. Rec. 1662 (1972).

On its face, Senator Ervin's first amendment was intended to bar the use of numerical measures in providing work place entry to minority workers. In his words, "it forbids discrimination in reverse." 118 Cong. Rec. 1663 (1972).

Among the opponents of Senator Ervin's first amendment was Senator Javits, who spoke at length in favor of the Philadelphia plan and in favor of race conscious numerical measures in general. 118 Cong. Rec. 1664-1676 (1972). In the course of his remarks, he summarized his opposition to the first Ervin amendment as follows:

> "I believe that the amendment does two things, both of which should be equally rejected.
>
> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans.
>
> "Second, the amendment, in addition to dismantling the Executive Order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment, and thereby further dismantle the efforts to correct these injustices." 118 Cong. Rec. 1665 (1972).

In support of his position, Senator Javits spoke approvingly of the numerical measures upheld in Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d

Cir.), cert. denied, 404 U.S. 854 (1971), and in United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), see 118 Cong. Rec. 1664-1665 (1972), and inserted into the Congressional Record copies of the courts of appeals' decisions in those cases, see 118 Cong. Rec. 1665-1675 (1972). Significantly, Senator Javits also spoke approvingly of the use of race conscious numerical hiring measures adopted voluntarily by employers in consent decrees, see 118 Cong. Rec. 1675 (1972), and inserted into the Congressional Record a copy of a report describing and summarizing two voluntarily adopted race conscious numerical measures, see 118 Cong. Rec. 1675-1676 (1972).

On a vote of 22 yeas, 44 nays, 34 not voting, the first Ervin amendment was defeated. 118 Cong. Rec. 1676 (1972).

Undaunted, Senator Ervin next introduced a similar amendment. His second amendment proposed to amend §703(j) of the Act, 42 U.S.C. §2000e-2(j), to prohibit all federal agencies from requiring the adoption of numerical measures. 118

Cong. Rec. 4917-4918 (1972). As Senator Ervin explained:

> "In short, this [amendment] would make it unlawful for the EEOC, the Office of Federal Contract Compliance, or any other federal agency or department in seeking to prevent so-called discrimination in employment from practicing discrimination in reverse such as is being practiced every day by the EEOC and also by the Office of Federal Contract Compliance." 118 Cong. Rec. 4917 (1972).

Senator Javits objected to the amendment on the grounds that the Senate had already decided the issue: "we voted on that here; we debated it and we decided it." 118 Cong. Rec. 4918 (1972). In response, Senator Ervin admitted that the "same question is involved." 118 Cong. Rec. 4918 (1972). Nonetheless, Senator Ervin added: "I sincerely hope that the Senate will agree to the amendment." 118 Cong. Rec. 4917 (1972). It didn't. Senator Ervin's second amendment was defeated even more convincingly than his first amendment: 30 yeas, 60 nays, 10 not voting. 118 Cong. Rec. 4918 (1972).

3. In 1978, Congress Yet Again Ratified The Use Of Race Conscious Measures Under Executive Order 11246

In 1978, during and subsequent to this Court's deliberations in Bakke, Congress again debated the appropriateness of race conscious numerical measures. Again, Congress ratified the use of such numerical measures.

The legislative vehicle in 1978 was an appropriations bill for HEW and for the Department of Labor. Under different amendments offered in the House and the Senate, those agencies would have been prohibited from using their appropriations under the bill in a manner which would require any individual or entity to adopt certain race conscious numerical measures.

Although both amendments were adopted, both thereafter were deleted by the House-Senate Conference--with the result that Congress enacted the appropriations bill, Pub.L.No. 95-480 (Oct. 18, 1978), 92 Stat. 1567, with no restrictions on the continued use of race conscious numerical measures.

The House amendment, introduced by Representatives Walker and Levitas, was directed at prohibiting HEW and the Department of Labor from requiring the adoption of most numerical measures:

> "No part of any appropriation contained in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex, and which requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." 124 Cong.Rec. 5371 (1978).

Despite the breadth of the amendment's language, its supporters focused on the use of quotas. According to Representative Walker, "the purpose of this amendment is to prohibit funding for any quota system within the Department of Health, Education, and Welfare and the Department of Labor so that practices of reverse discrimination can be stopped." 124

Cong. Rec. 5371 (1978). In a colloquy with Representative Levitas, Representative Walker indicated that the amendment would affect other numerical measures but not goals and timetables:

> "Mr. LEVITAS. My question is, Is it quite clear that this amendment would not prohibit the use of affirmative action programs that do not rely upon or utilize numerical quotas, numerical ratios, or other numerical requirements, but could use such things as goals or timetables?
>
> "Mr. WALKER. I think that is very clear in this amendment." 124 Cong. Rec. 5372 (1978).

As the debate in the House proceeded, there was understandable confusion about which numerical measures would be prohibited and which would not. Despite this confusion, the amendment was bitterly opposed by a number of representatives. Speaking in opposition, Representative Mitchell stated that minorities would not be able to move

> "from our present holding plateau level unless we have some affirmative action that has some targets, some timetables. It has to have

> a basis in numbers." 124 Cong. Rec. 5374 (1978).

Representative Fenwick echoed this concern:

> "What we have been trying to do is to make sure that our fellow citizens are given for once a fair chance." 124 Cong. Rec. 5376 (1978).

After further debate, the amendment was passed 232-177.

The amendment in the Senate was offered by Senator Hayakawa on behalf of Senator Helms. Although they were aware of the breadth of the House amendment, Senators Hayakawa and Helms directed their amendment not at the Department of Labor but only at HEW. The Hayakawa-Helms amendment also differed from the amendment in the House in that it prohibited HEW only from requiring a "quota...with respect to the admissions policies or practices of any institution of higher education." 124 Cong. Rec. 16280 (1978). In extended remarks, the two Senators explained that this amendment in fact was directed only at HEW requirements

for fixed and rigid quotas in educational admissions in higher education. 124 Cong. Rec. 16280-16283 (1978). With very little debate, the amendment was adopted on a voice vote. 124 Cong. Rec. 16283 (1978).

The amendments, however, did not survive further congressional scrutiny. Both amendments were deleted from the appropriations bill by the House-Senate Conference. See Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978). Specifically, the House-Senate Conference Committee:

> "Delete[d] language proposed by the House which would have prohibited the use of funds in the bill in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, sex, and which requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." Id.

The House-Senate Conference Committee also:

> "Delete[d] language proposed by the Senate which would have prohibited the use of funds in the bill in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any quota related to race, creed, color, national origin, or sex, and which requires any individual or entity to take any action with respect to the admissions policies or practices of any institution of higher education." Id.

With no language restricting the ability of HEW or the Department of Labor to require the adoption of race conscious numerical measures, the appropriations bill was then enacted into law by Congress. Pub.L.No. 95-480 (Oct. 18, 1978), 92 Stat. 1567.

4. Based Upon This Legislative History, Federal Agencies Have Affirmatively Sanctioned The Voluntary Use Of Race Conscious Measures

Pursuant to authority delegated to them, and based upon the 1969 and 1971-1972 legislative history reviewed above, federal agencies in the discharge of

their responsibilities have issued regulations and guidelines uniformly encouraging voluntary compliance through the adoption of race conscious numerical measures. Three sets of regulations and guidelines have particular applicability to private employers.

(1) 41 C.F.R. Part 60-2, the Department of Labor pursuant to §201 of Executive Order 11246 has set forth its regulations on Affirmative Action Programs for Government Contractors, also known as Revised Order No. 4.

(2) In 29 C.F.R. Part 1607, the EEOC pursuant to §713 of its Act, 42 U.S.C. §2000e-12, has set forth its Uniform Guidelines on Employee Selection Procedures which in §1607.13B and §1607.17 incorporate the federal Policy Statement on Affirmative Action.[29/] The

29. This Policy Statement on Affirmative Action was first issued at 41 Fed. Reg. 38814 (Sept. 13, 1976), by the member agencies of the federal Equal Employment Opportunity Coordinating Council, an umbrella Council created in 1972 by §715 of the Act, 42 U.S.C. §2000e-14. On July 1, 1978, all functions of the Council were transferred to the EEOC and the Council was abolished. See Executive Order 12067, 43 Fed. Reg. 28967 (July

identical Guidelines and Policy Statement of the Department of Labor are set forth at 41 C.F.R. Part 60-3; of the Department of Justice are set forth at 28 C.F.R. Part 50.14; and of the Civil Service Commission are set forth at 5 C.F.R. Part 300.103(c).

(3) In 29 C.F.R. Part 1608, the EEOC pursuant to §713 of its Act, 42 U.S.C. §2000e-12, has set forth its Affirmative Action Guidelines.

Each of the foregoing three sets of regulations and guidelines authorizes and encourages nearly identical procedures for the adoption of race conscious numerical measures: each encourages employers to determine whether they are deficient in the utilization of minority workers; and each encourages voluntary adoption of race conscious numerical measures to overcome any utilization deficiencies especially where an employer has reason

5, 1978), implementing Presidential Reorganization Plan No. 1, 43 Fed. Reg. 19807 (May 9, 1978). Because the functions of the Council terminated, the EEOC and the other agencies thereafter reissued the Policy Statement on Affirmative Action, 43 Fed. Reg. 38290 (Aug. 25, 1978).

to believe that its employment practices have had a racially exclusionary effect in the past.

Agency regulations and guidelines interpreting remedial legislation, of course, are ordinarily entitled to great weight. E.g., Lau v. Nichols, 414 U.S. 563, 571 (1974) (concurring opinion of Stewart, J.); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Yet, here there are two reasons to pay even greater deference to these regulations and guidelines. First, the latter two sets of guidelines were issued not only pursuant to Title VII but also pursuant to Executive Order 12067, 43 Fed. Reg. 28967 (July 5, 1978),[30/] in which the President expressly directed the EEOC on behalf of all federal agencies to "develop uniform standards, guidelines and policies defining the nature of employment discrimination" and expressly directed that all "agencies shall comply with all final rules, regulations, policies, procedures or orders of the" EEOC. In view of this

30. See note 29, supra.

express Presidential authorization, the guidelines are entitled to tremendous deference. See, Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

A second and equally compelling reason to pay even greater deference to these regulations and guidelines, see Regents of the University of California v. Bakke, 57 L.Ed.2d 804-806, 823 (1978) (opinion of Brennan, J.), is that they are consistent both with the intent of Title VII and the Executive Order, and with the repeated congressional ratification of race conscious numerical measures.

5. There Is No Conflict Between Executive Order 11246 And Title VII

Neither Congress, in its many deliberations over race conscious numerical measures under Title VII and Executive Order 11246, nor the many federal agencies which have issued affirmative action regulations and guidelines under Title VII and Executive Order 11246 have been able to discover any conflict between Title VII

and Executive Order 11246. There in fact is no conflict.

Nonetheless, a majority of the court of appeals below somehow discerned a conflict and thereupon held that the race conscious requirements of Executive Order 11246 "must fall before Title VII's direct congressional prohibition" against discrimination. 563 F.2d at 216.

Although the majority below, having found a conflict, correctly looked to Justice Jackson's concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634-660 (1952), the majority below erred first by failing to understand that there was no conflict, second by not recognizing the express sources of Presidential power here, third by refusing to review Congress' repeated approval of race conscious numerical measures under Title VII and the Executive Order, and finally by misapplying Justice Jackson's analytical framework set forth in Youngstown.

In his concurring opinion in Youngstown, Justice Jackson established three categories for determining the validity

of Presidential powers which conflict with those of Congress:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances ... [Presidential action] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> "2. When the President acts in absence of either a congressional grant or denial of authority...there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.
>
> "3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb... [and any] claim to a power at once so conclusive and preclusive must be scrutinized with caution." 343 U.S. at 635-638.

In Youngstown, Justice Jackson placed President Truman's Executive Order seizure of the steel mills in category three because, as a majority of the Court recognized, Congress on a number of occasions prior to 1952 considered and explicitly rejected proposals which would have given the President power to seize the mills. 343 U.S. at 585-589. The majority below, based only upon a wooden understanding of Justice Jackson's analysis, placed Executive Order 11246 also in category three. 562 F.2d at 216.

Not understood by the majority below, Executive Order 11246 is based upon the procurement powers expressly authorized by Congress in Titles 40 and 41 of the United States Code. See discussion at pp. 61-62, supra. And not recognized by the majority below, the use of race conscious numerical measures has been repeatedly ratified by Congress. See discussion at pp. 74-95, supra. Thus, even if there were any discernible conflict between Title VII and the Executive Order here, Executive Order 11246 would be placed in Justice Jackson's first

category where it "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation." 343 U.S. at 636.

The error of the majority below, however, was even more fundamental. As we have explained in Point A, supra, there can be no conflict at all because both Title VII and the Executive Order are directed toward the same end of voluntary compliance through the adoption of race conscious numerical measures providing work place entry to minority workers.

C. Even Under The Erroneous Theory Of The Case Urged By Respondents, The District Court Erred In Failing To Join A Representative Of The Affected Black Employees As A Necessary Party Under Rule 19(a) And In Failing To Allocate Properly The Burdens Of Proof

Respondents' theory, that a finding of unlawful discrimination against minority workers is a pre-condition to approval of a privately established race conscious remedial measure, pre-supposes the potential for a genuine adversary judicial hearing on the issue of the existence (or non-existence) of on-site racial discrimination. Given the parties before the district court in this case, such an adversary hearing was an impossibility.

Respondents, of course, had no interest in arguing that racial discrimination in hiring or promotion existed at the Gramercy plant. Kaiser, mindful of its potential liability under Title VII, certainly had no interest in presenting evidence of racial discrimination at its Gramercy plant.[31/] The

31. A finding that racial discrimination had occurred at the Gramercy plant would have

Steelworkers, which, ordinarily would be expected to represent the interests of the affected minority workers, was similarly inhibited from establishing the existence of racial discrimination at the Gramercy plant since proof of racial discrimination would have exposed the Steelworkers to Title VII liability and would have raised questions concerning a possible breach of the duty of fair representation. E.g., Humphrey v. Moore, 375 U.S. 335 (1964). Thus, each participant before the district court possessed a strong pecuniary interest in denying that racial discrimination had occurred. Not surprisingly, therefore, the parties before the district court--although divided on the issue of whether a finding of racial discrimination was necessary to validate the plan--were in comfortable agreement that no racial

collaterally estopped Kaiser in any subsequent Title VII action seeking back pay. Parklane Hosiery Company, Inc. v. Shore, 47 U.S.L.W. 4079 (Jan. 9, 1979) (No. 77-1305). Kaiser was already under attack for allegedly discriminating at its nearby Chalmette plant. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978).

discrimination had taken place. The district court placed its imprimatur on this exculpatory consensus by entering a finding that no racial discrimination had occurred at Kaiser's Gramercy plant. Such a procedure does not satisfy minimum procedural standards of fairness and certainly cannot provide the basis for setting aside a private plan aimed at eradicating the effects of reasonably apprehended racial discrimination.

First, given the non-adversary posture of the parties on the question of racial discrimination, no case or controversy existed on the issue. E.g., Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971); United States v. Johnson, 319 U.S. 302 (1943). See generally, Muskrat v. United States, 219 U.S. 346 (1911).[32]

32. The lack of a case or controversy on the question of racial discrimination strips the district court of power to enter a finding as to its existence. While Amici do not suggest that Kaiser and the Steelworkers acted in bad faith, toleration of non-adversary fact-finding on the question of racial discrimination virtually invites collusive litigation. For example, an employer facing potential Title VII difficulties might be tempted to promulgate a voluntary plan, never intending to enforce it, and await challenge by adversely affected white workers. Since, as in the district court in this case, no party to such a challenge would be motivated to offer proof that discrimination had occurred, the court would, as did the district judge below, enter a finding of non-discrimination. The employer would then be in a position to use the findings as stare decisis if not collateral estoppel, against minority workers alleging Title VII liability.

Second, even if a bare case or controversy was presented, settled principles of judicial administration require the joinder of affected black workers as necessary parties-defendants under Rule 19(a).[33] E.g., Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Lumberman's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1954); Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961). See generally, Shields v. Barrow, 17 How. 130, 139 (1854).

33. Once joined as necessary parties under Rule 19(a), consideration could be given to certifying the joined black workers as class representatives under Rule 23. In the absence of retained counsel, court appointed counsel for the class would be possible.

Rule 19(a) provides that an available person "shall be joined as a party" if he claims an interest relating to the subject of the action which, as a practical matter, might be seriously impaired by the disposition of the action. Rule 19(a)(2)(i) FRCP.[34] Minority employees at Kaiser's Gramercy plant clearly fall within such a description of a Rule 19(a) "necessary" party. E.g., Provident

34. Rule 19(a) states:

"Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." Rule 19(a) F.R.C.P.

Tradesman Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).[35] Accordingly, the district court was under an obligation to order joinder of the affected minority workers under Rule 19(a). English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972). Of course, the failure of the parties before the district court to insist upon joinder cannot relieve that court from its obligation to order the joinder of available "necessary" parties whose interests were not adequately represented by the parties actually before the court. As Mr. Justice Harlan noted in discussing Rule 19 in Provident Tradesmen:

> "When necessary...a court of appeals should, on its own

35. Given the amenability of minority employees at the Gramercy plant to service of process and given the non-diversity jurisdictional base of respondents' complaint, the "availability" of the minority employees under the first sentence of Rule 19(a) is not open to question. It is, therefore, not necessary to consider whether the affected minority employees would be "indispensible" parties under Rule 19(b). Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." 390 U.S. at 111.

Amici do not suggest that in an ordinary Title VII case, employees whose interests are potentially adversely affected must be joined as necessary parties. In such ordinary Title VII contexts, the named defendants--typically the employer and the union--will generally represent the interests of the potentially affected employees in an adequate manner. See generally, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970). In ordinary Title VII contexts, the duty of fair representation owed by a union to all employees--minority and white--may be relied upon to render the union an adequate surrogate for potentially affected employees. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Unlike an ordinary Title VII case, however, the union in this case was confronted with an insurmountable conflict of interest. In order to serve the interest of the absent minority

workers, the union would have been required to introduce evidence of past racial discrimination at the Gramercy plant--evidence which would have exposed the union treasury to potential Title VII liability. When, as here, a union's pecuniary interests are in direct conflict with the interests of absent employees, the union cannot be relied upon to act as the surrogate for the absent employees. English v. Seaboard Coast Line Railroad, 465 F.2d 43 (5th Cir. 1972); Hayes v. Seaboard Coast Line R.R., 3 C.C.H. E.P.D. ¶8169 (S.D. Ga. 1971); Banks v. Seaboard Coast Line R.R., 51 F.R.D. 304 (N.D. Ga. 1970). Cf., Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973).[36] Thus, at a minimum, the judg-

36. Given the clear applicability of Rule 19(a), it does not appear necessary to consider whether notions of procedural due process could be violated by permitting the issue of racial discrimination to be litigated in the absence of the only affected party with an interest in proving it. However, decisions of this Court make clear that notice and an opportunity to participate in the hearing are fundamental elements of procedural due process of law. E.g., Mullane v. Central

ment below must be vacated and the case remanded for a hearing at which potentially affected minority workers must be joined as parties-defendants.

Since, even under respondent's view of the case, additional proceedings would be necessary in the district court, it is appropriate to consider the proper procedures which the district court should follow on remand.

First, the district court should consider whether the minority workers joined under Rule 19(a) should be treated as the representatives of a Rule 23 class or whether each affected worker should be individually joined. Second, the district court should assure that the joined minority employees are adequately

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Hanover Bank & Trust Co., 339 U.S. 306 (1950). Indeed, the fact that notions of due process would almost certainly prevent the district court's findings on racial discrimination from being given preclusive effect create the very real possibility that both Kaiser and the union will be subjected to inconsistent adjudication on the issue. Such a possibility is yet another basis for invoking Rule 19. See Rule 19(a)(2)(ii) F.R.C.P.

represented by competent counsel.

Third, the district court should provide the joined minority employees with an opportunity to assert cross-claims for relief pursuant to Rule 13(g) against Kaiser and the Steelworkers as co-defendants.

Fourth, the district court should encourage the settlement of any such cross-claims in accordance with the long standing policy of the Fifth Circuit. E.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Any such bona fide settlement could be incorporated in a consent decree terminating the Rule 13(g) cross-claims. Such a consent decree should constitute sufficient judicial validation of the existence of racial discrimination to satisfy even respondents.

Finally, if settlement of the cross-claims proves impossible, the parties would proceed to trial on the issue of racial discrimination. Since respondents here are plaintiffs below seeking to set aside the status quo (consisting of the

privately established plan), orthodox evidentiary analysis allocates the persuasion and production burdens on the issue of racial discrimination to them. Where a plaintiff (either the government or a private party) seeks to compel an unwilling defendant to alter his status quo in favor of a race conscious remedy, the plaintiff appropriately bears the burden of proof on the facts needed to establish the claim. Furnco Construction Co. v. Waters, 57 L.Ed.2d 957 (1978). Where, as here, a plaintiff seeks to set aside an existing privately established plan, he should bear a similar burden of proof. See generally, James, Burdens of Proof, 47 U.Va.L.Rev. 51 (1961). Moreover, modern analysis suggests that a court's decision as to the allocation and size of the burden of proof is, often, an attempt to deflect error in accordance with strongly held social policies. E.g., Mullaney v. Wilbur, 421 U.S. 624 (1975); Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 358 (1969). See generally, Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion

in Criminal Cases, 86 Yale L.J. 1299 (1977); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959). Two strong social policies coalesce in imposing the burden of proof on persons seeking to set aside privately adopted plans aimed at remedying reasonably apprehended racial discrimination. First, racial discrimination is and has been for 25 years, this nation's most pressing social problem. The docket of this Court over the past generation bears witness to our nation's struggle against bigotry and racism--a struggle which, while not yet successful, is, nevertheless, a source of some pride. Where reasonable grounds exist for persons to believe that racial discrimination has occurred, it is consistent with our national commitment to eradicating racial discrimination against vulnerable minorities to require persons seeking to frustrate remedial action to demonstrate that no such remedial action is necessary. Second, as Amici have noted at pp. 42-55, supra, a core principle of American jurisprudence is the encouragement of

"private ordering." See generally, H. Hart & A. Sachs, The Legal Process: Basic Problems in the Making and Application of Law, 183-185 (Unpub. Ed. 1958). Thus, when private parties seek in good faith to assist in resolving a pressing social problem, we should be loathe to reject their private established remedial plans. Where, as here, persons have in good faith used "private ordering" in the struggle to remedy the effects of reasonably apprehended past racial discrimination, the burden of proof should lie with persons seeking to set aside the plan. Put bluntly, error should be deflected in favor of good faith private attempts to cope with reasonably apprehended racial discrimination.

Finally, even if the burden of proof on the issue of racial discrimination is deemed to rest with the joined minority employees, the evidence demonstrates the clear existence of an unrebutted prima facie case of discrimination at the Gramercy plant. See pp. 9-16, supra. Suffice it to say that the evidence concerning the Gramercy plant would

parallel the evidence found by the Fifth Circuit to constitute a prima facie case of discrimination at the nearby Chalmette plant. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). In accordance with standard Title VII practice, the establishment of a prima facie case would shift the production burden to Kaiser, the union and the respondents to rebut the prima facie case with evidence demonstrating a non-racial explanation for the apparently discriminatory pattern. E.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973). If the prima facie case were successfully rebutted, traditional Title VII practice requires that the persuasion burden remain with the minority employees. Furnco Construction Corp. v. Waters, 57 L.Ed.2d 957 (1978).

Whatever the wisdom of imposing the persuasion burden on Title VII plaintiffs in an ordinary case, Amici believe that the persuasion burden should be borne by persons seeking to set aside a good faith private remedial plan. It is unnecessary

to resolve the question at this stage of the case, since the parties have not shown an ability to rebut the prima facie case.

Thus, on remand, unless the case is settled, Kaiser and the Steelworkers, at a minimum, would be obliged to rebut a prima facie case of discrimination, rather than presenting no evidence, as they did below.

CONCLUSION

For the reasons set forth in Points A and B, the judgment below should be reversed. If the judgment is not reversed, it nonetheless should be vacated and remanded for the reasons set forth in Point C.

Dated: New York, New York
January 25, 1979

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* We wish to express our appreciation to Paul Landau of Hofstra Law School for his assistance with this brief.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States
October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioners,

v.

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

BRIAN F. WEBER, et al.,
Respondents.

MOTION FOR LEAVE TO SUBMIT BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-840-1891

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UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO SUBMIT BRIEF
AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter the "National Union") moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Petitioners. In support of the motion, the National Union shows as follows:

1. NATURE OF THE APPLICANT'S INTEREST.

The National Union is a labor organization which represents approximately 100,000 health care employees in over 350 health care institutions. The vast majority of the National Union's members, particularly in the non-skilled service positions, are non-white. Tne two districts within the National Union, District 1199-New York and District 1199-C-Philadelphia, have negotiated union-management training funds pursuant to Section 301(c)(6) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c)(6). These Funds are jointly managed by an equal number of Union and management trustees and are funded by collectively bargained employer contributions.

One of the goals of these training funds is to provide opportunity for advancement of minorities into the skilled technical and professional jobs

through training programs, tuition grants and remedial educational programs. The health care industry in New York and Philadelphia has had in the past an extreme overrepresentation of non-white employees in the non-skilled service jobs and an extreme underrepresentation in the skilled technical and professional jobs. It is the belief of the National Union that these Training Funds have helped lessen this racial imbalance.

As the affirmative action policies and practices of the National Union, as well as the Training Funds, may be seriously affected by the decision in this case, the National Union is vitally concerned and interested in this appeal. The interests of amicus are more fully set forth in the Statement of Amicus Interest contained in the annexed brief.

2. AMICUS' QUALIFICATION.

Because of its interest in issues pertaining to matters of great public concern in the area of labor relations and civil rights, the National Union submitted briefs Amicus Curiae to this court in other cases including the recent case of Beth Israel Hospital v. NLRB, No. 77-152. The National Union itself has has been a direct party to numerous cases before the Federal appeals courts including this court. See,

e.g., National Union of Hospital and Health Care Employees v. Carey, 557 F.2d 278 (2nd Cir. 1977).

3. THE NEED FOR THE NATIONAL UNION AS AMICUS.

The National Union's unique vantage point as a labor organization which represents primarily non-white unskilled health careworkers and which maintains established industry-wide training and upgrading funds will be of unquestionable assistance to the court in deciding the issues raised in this case.

4. REQUEST FOR CONSENT TO SUBMIT.

On January 16, 1979, the National Union requested the consent of petitioners and respondents to submit a brief Amicus Curiae. To date, no response has been received.

WHEREFORE, it is respectfully moved that the National Union be granted leave

to file the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
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AMICUS CURIAE BRIEF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO.

STATEMENT OF AMICUS INTEREST

This brief is submitted by the National Union of Hospital and Health

Care Employees, RWDSU, AFL-CIO ("National Union"), on behalf of the petitioners.

The National Union is a labor organization which represents approximately 100,000 health care employees in over 150 health care institutions. The majority of the National Union's members, particularly those employed in non-skilled service positions, are non-white.

In the early 1950's, the major hospitals in New York City were virtually unorganized. Wages for service employees as low as $35 per week were not uncommon. The service jobs were occupied primarily by non-white persons while the skilled positions were occupied almost entirely by white workers.

In 1958, the National Union's predecessor, Local 1199, Drug and Hospital Union, AFL-CIO, began a massive organiing campaign of hospitals in New York City. The campaign began at Montefiore Hospital in New York City and resulted in a now historic election victory and collective bargaining agreement. At that time, health care employees were excluded from the protection of both the National and New York State Labor Relations Acts,* and were not afforded

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* New York Labor Law §701 et seq.; National Labor Relations Act, 29 USC §151, et seq.

the right to join a union through a State or National Labor Relations Board election. One of the primary goals of the union at that time was the right of hospital workers to vote in a union election. After the agreement was reached with Montefiore, the campaign spread to other major hospitals and finally resulted in the first major strike of hospitals in labor history.

This historic strike ushered in the era of unionization of hospital workers. The Union's early goals of organizing in New York's major hospitals, were met and in 1963 the New York State Labor Relations Act was amended to include coverage of health care employees. Within a period of 10 years after the first historic victory for hospital workers the Union achieved its goals of a $100.00 minimum weekly wage and of an employer contributed pension and welfare plan. To date, the National Union has organized over 80,000 health care workers in the New York City and Philadelphia areas alone, the vast majority of whom are non-white.

In addition to the goals with regard to wages, pensions and welfare, the Union undertook to affirmatively remedy the racial imbalance in the unskilled as opposed to the skilled level jobs. The Union is divided into two divisions, the Hospital Division, which represents unskilled service and maintenance hospital employees, and the Guild Division, which represents technical and professional hospital employees. The unskilled service employees were in 1968 predominantly non-white, whereas the skilled

technical and professional employees were predominantly white. In order to remedy this inequality and to provide an opportunity for the Union's non-skilled members to achieve the skills needed for promotion to the numerous technical and professional level jobs, the Union in 1969 established through voluntary collective bargaining, the Hospital League-Local 1199 Training and Upgrading Fund.* A similar Fund was negotiated in Philadelphia in 1974.

Both Funds were formally established by an "Agreement and Declaration of Trust", both of which embody the goals and objectives of the Funds. A Board of Trustees, comprised of an equal number of Union and Employer representatives, was then established to administer the Funds. Each Fund is administered by a separate Board.

The purpose of the Funds are spelled out in Article III of the Agreement. "The purpose of the Trust Fund, among other things, shall be . . . to plan for, develop, establish and implement programs and procedures for the training, re-training, education and upgrading of employees, to the end that existing shortages of health care personnel may be alleviated and employees may have increasing opportunities for improvement, promotion, advancement, and upgrading . . . and to provide increased employment opportunities, training and upgrading in the health care industry and to recruit employees therefor. . . ."

Both Training and Upgrading Funds

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* Now known as the Hospital League-District 1199 Training and Upgrading Fund.

recognize the fact that many hospital and nursing home employees have a vast amount of on-the-job experience and skills, but lack the formal education needed for advancement due in many cases to the lack of educational opportunities and under-priviledged backgrounds attributable to race and national origin. Over 60% of the current participants in Fund programs are non-white. The Funds have been established to provide the education these employees are lacking. Some employees of high ability are locked into dead-end jobs because they simply lack the required High School Diploma needed for advancement and/or promotion. The Funds are also committed to help them overcome this obstacle. In short, the Hospital League/District 1199 Training and Upgrading Fund and the Philadelphia Hospital and Health Care - District 1199C Training and Upgrading Fund exist to meet the whole range of educational needs of their member-employees in the Hospital-Health Care Field. The overriding goal and commitment of the Training and Upgrading Funds are to put an end to dead-end jobs by affirmatively undoing the effects of societal discrimination against minorities and the poor.

The Hospital League/District 1199 Training and Upgrading Fund was established on July 1, 1969 by contractual agreement between District 1199 (then Local 1199) National Union of Hospital and Health Care Employees, RWDSU/AFL-CIO and the League of Voluntary Hospitals and Homes of New York. At the time of its inception it covered only League Institutions; subsequently a Training Fund clause has been written into

virtually every New York City contract (including Westchester, Long Island and New Jersey) as a result of which the Fund now receives support from some 120 health care institutions in the Metropolitan Area and covers approximately fifty (50) thousand members.

The Fund is supported by a 1% contribution made by management based upon gross payroll. It is governed by a Board of Trustees consisting of fourteen members seven Union Trustees and seven Hospital Trustees. Its income in the fiscal year 1977-1978 was approximately 5.4 million dollars. The mandate of the Fund is to break the chain of deadend jobs that have traditionally plagued the health care industry. This is a pioneering effort in an industry that traditionally has never made provisions for workers to move upward without going back to school to "gather" another credential or diploma. In order to fulfill its mandate the Fund has had to develop programs (frequently by trial and error) that prepare working members of District 1199 to acquire skills they may never have acquired while in school, or to give them an opportunity to "brush up" on skills they may have lost since leaving school. The Fund runs a variety of Remediation programs for this purpose. Members come to Remediation on their own time to prepare to go into full time programs.

Once accepted into a full time program the member is released from his (her) job on a leave of absence. They are allowed to go to school free from the pressures of work, receiving a stipend from the Fund

equivalent to 85% of their net salary (with a maximum of $150.00 per week), the Benefit and Pension Fund coverage for the member, tuition, books and uniforms are also paid. Upon graduation, the members' institution is obligated to take them back in their old position and to offer them a position in their new category as soon as one is available. The cost to the Fund to support a full time student is approximately $11,000.00 per year. Because a student receives virtually full support, this is an extremely expensive program to operate and a very large investment is made in each student. In practice, approximately 90% of the Fund's graduates go back to their original institution.

The Remediation Program includes 2 basic components at present, both designed to prepare member-employees for advance college level study or, more specifically, to provide an opportunity for educationally disadvantaged members to participate in advanced studies under the Training and Upgrading Fund.

The two basic courses are: (1) the ABE/GED Program which prepares members for the High School Equivalency Diploma, and (2) the Post High School Refresher which is designed to reinforce the basic academic skills of high school graduates, seeking admission to college/level, allied health programs.

The National Union believes that the Training and Upgrading Funds are largely responsible for lessening the racial

imbalance in the skilled, technical, and professional positions in health care institutions in the New York area. While the percentage of non-white persons employed in the skilled positions is still low as compared to the percentage of non-white persons employed in industry in the New York City area, the discrepancy has been vastly reduced since the National Union's efforts at training and upgrading began in 1969.

These voluntary programs resulted from private voluntary collective bargaining. They are a tribute to what labor and management may achieve if allowed to implement voluntary affirmative action programs. This Court's decision may have a profound impact on the policies of the Training Funds administered by the National Union. The achievements of the Training Funds in advancing minorities into skilled technical and professional positions in the health care industry may be undone if this Court hampers such efforts by affirming the court below. Model programs for affirmative action in integrating skilled job categories collectively bargained in good faith should not only be approved by this Court, but lauded by it.

STATEMENT OF THE CASE

Amicus will not burden the Court with a restatement of the facts but rather, endorses the statement contained in petitioners' briefs. Amicus further joins in and endorses the statement and arguments contained in the brief amici curiae of the Affirmative Action Coordinating Center, et al.

ARGUMENT

AN EMPLOYEE TRAINING AND UPGRADING PROGRAM DESIGNED TO AID MINORITIES IN ACHIEVING HIGHER LEVEL AND SKILLED POSITIONS ESTABLISHED THROUGH GOOD FAITH UNION-MANAGEMENT COLLECTIVE BARGAINING IS NOT VIOLATIVE OF TITLE VII.

Thiscase involves two Federal Policies of equal stature, the policy of promoting private voluntary resolution of industrial disputes through the collective bargaining process expressed in the Labor-Management Relations Act of 1947, 29 U.S.C. §141 et seq. ("LMRA') and the policy of achieving equal opportunity in employment for minorities expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). Both of these Federal Policies would be furthered by a reversal of the court below and would be hindered by affirmance.

The labor-management policy which has perhaps been most consistently and uniformly approved by this Court since the enactment of the LMRA is that union and management should be free to voluntarily engage in good faith collective bargaining in order to resolve their disputes and reach agreement on terms and conditions of employment. Textile Workers v. Lincoln Mills,

353 U.S. 448 (1957); United Steelworkers v. American Mfg. Co., 363 U.S. 565; United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593; Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235.

So long as the union represents all employees in the bargaining unit fairly and in good faith, the courts may not interfere in the voluntary bargaining process. Vaca v. Sipes, 379 U.S. 650. The union need not bargain identical terms and conditions for all employees. Good faith consideration of social factors may allow a union to seek preferential treatment in promotional opportunities for a particular group. Ford Motor Co. v. Huffman , 345 U.S. 330. The creation of a training and upgrading program negotiated in good faith to eliminate an observed racial imbalance in skilled job categories is exactly the type of privately negotiated program that federal labor policy seeks to promote. Indeed, Section 302(c)(6) of the LMRA, 29 U.S.C. §186(c)(6) excepts from its criminal provisions monies contributed to jointly managed trust funds established for the purpose of financing employee training programs. As pointed out in the Statement of Amicus Interest, the National Union has established Union-Management Training and Upgrading Funds which finance training programs for employees who seek to learn the technical and skilled occupations in the health care field. Currently approximately

60% of the employees funded by the Training and Upgrading Fund are non-white. The Training and Upgrading Fund has been a major factor in training minorities for technical jobs in an industry in which minorities have been traditionally overrepresented in the lower level service and maintenance jobs while being highly overrepresented in the technical and professional jobs. The Training and Upgrading Fund has trained minority employees for a variety of technical and professional positions in health care and has played a major role in bringing a racial balance to these higher level and higher paying positions. Such collectively bargained affirmative action training programs may be jeopardized by an affirmance of the decision below. Amicus has striven to eliminate the relics of slavery and discrimination from the health care industry through the negotiation of training funds and increased promotional opportunities for its members, the vast majority of whom are non-white. Amicus opposes the attempted misuse of progressive social legislation such as Title VII to interfere with good faith attempts on the part of union and management to eliminate racial imbalances in the work place through voluntary private collective bargaining.

Title VII was intended by Congress to continue the favored process of voluntary private resolution of disputes through collective bargaining. To

this end, Congress specifically provided that Title VII does not mandate a union and an employer to either grant or deny preferential treatment to racial minorities because of underrepresentation in the work force. 42 U.S.C. §2000e-2(j). Rather, Congress left such preferential programs within the realm of acceptable voluntary practices. Indeed, a good faith attempt to voluntarily eliminate underrepresentation of minorities in the skilled craft positions furthers the ends Congress sought to achieve in enacting Title VII without the need for mandatory government regulation.* Title VII was meant to eliminate the underrepresentation of minorities in the work place and in the skilled trades and not as an instrument to further such underrepresentation on the pretext of reverse discrimination. In fact, training programs such as those at petitioner Kaiser and the one administered by amicus tend to benefit white workers by making training programs available to them where none would have existed otherwise.

If this Court affirms the decision below, voluntary Union-management affirmative action training programs will have

* Executive Order 11246 and EEOC Affirmative Action Guidelines. As stated by the Executive Board of the Federal Government in EEOC's Affirmative Action Guidelines, the purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action".

been struck a fatal blow as:

1. Employers and union will only be able to implement such programs if they admit the existence of racial discrimination in violation of Title VII at their work place. Such an admission would be embarrassing and would subject the employer and possibly the union to lawsuits and possible financial liability. Under such circumstances, employers would be reluctant to voluntarily agree to affirmative action programs;

2. If the employer and the union did implement a voluntary affirmative action training program without an admission of racial discrimination, it would subject them to Weber type reverse discrimination suits.

This would place unions and employers who wished to engage in good faith voluntary affirmative action programs beneath the Sword of Damocles. The result would be that no affirmative action programs would be implemented without EEOC intervention. This would, of course, be costly and defeat the favored policy of private voluntary action in labor-management relations. To create a situation in which only the government and the courts would implement the cherished national policy of the creation of equal employment

opportunities for minorities in the work place would run afoul of both Title VII and of the LMRA. Courts should not hinder the voluntary efforts of labor and management to in good faith correct the results of a society that has in the past denied equal opportunity to minorities. Title VII is not unconscious of race. Title VII is not simply an anti-discrimination statute. It is federal legislation which was enacted to afford minorities equal employment opportunities. Indeed, Title VII was deemed by Congress the Equal Employment Opportunity Act and established the Equal Employment Opportunity Commission. Title VII contemplates and condones voluntary affirmative action. Title VII was not intended to force government to interfere with voluntary good faith efforts of union and management to create equal opportunities for minorities through preferential treatment. The very existence of collectively bargained programs which attempt to further the promotional opportunities of minorities is a tribute to the wisdom of this court in favoring voluntary private resolution of industrial problems. Steelworkers Trilogy, supra. This court should continue this policy by reversing the court below and not interfering with the good faith voluntary attempts of unions and management to clean the Augean stables without Government intervention. If it were not for such efforts, plaintiff Weber would not have even had a training program to apply to in the first instance.

CONCLUSION

Amicus, National Union endorses the basic position adopted by the Affirmative Action Coordinating Center and other participating labor and civil rights organizations that:

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As stated by the Executive Branch of the federal government in the EEOC's Affirmative Action Guidelines, the purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action".

4. Title VII and the anti-discrimination principle should not exclusively be a search for villains and villainous acts; on the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. We know that the cure to discrimination against non-white people and discrimination against women are

inextricably linked.

6. We endorse voluntary action on the part of employers and unions to redress the national patterns of discrimination addressed by Title VII and Executive Order 11246 and realize that this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. From our experience we know that in many instances "employment tools which recognize the race, sex or national origin of applicants and employees" (See Affirmative Action Guidelines) such as those in issue in this case are the logical means by which true equal opportunity can be achieved.

8. Our call for voluntary affirmative action in no way diminishes our support for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

For these reasons and for the reasons set forth in the argument above, the orders of the courts below should be reversed and the complaint dismissed.

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Stepto & Johnson
1250 Connecticut Ave., N.W.
Washington, D.C. 20003
Attorneys for defendants Kaiser Aluminum Co., et al.

Re: Weber v. Kaiser Aluminum Co., et al.

Dear Counsel:

Request is made on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, to file a brief amicus curiae in the above-referenced case on behalf of the defendants.

Wade H. McCree, Esq.
Michael H. Gottesman, Esq.
Michael R. Fontham, Esq.
Thomson Powers, Esq. -2- January 16, 1979

The National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, is a labor organization representing over 80,000 employees in the health care industry and a joint manager of a training and upgrading fund whose policies may be affected by the outcome of this case.

Thank you for your consideration of this matter.

Sincerely,

JEROME TAUBER

JT:iat

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January 18, 1979

OUR FILE NUMBER

Jerome Tauber, Esq.
Sipser, Weinstock, Harper,
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380 Madison Avenue
New York, New York 10017

Re: United Steelworkers of America, AFL-CIO-CLC v. Weber, et al, No. 78-432; Kaiser Aluminum & Chemical Corporation v. Weber, No. 78-435; United States of America, et al v. Weber, et al, No. 78-436

Dear Mr. Tauber:

In response to your letter of January 16, 1979, this letter is to inform you that the respondents in these cases have no objection to the filing of a brief amicus curiae on behalf of any party in the Supreme Court of the United States.

Sincerely,

Michael R. Fontham
For STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

MRF/law

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

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Civil Right Cases, 109 U.S. 3 (1883) 18

Contractors Association v. Secretary of Labor, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971) 14

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Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) .. 16

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United States v. Elevator Contractors, 538 F. 2d 1012 (3rd Cir. 1976) 14

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United States v. Wood, Wire and Metal Lathers, 471 F. 2d 408 (2nd Cir. 1973), cert. den. 412 U.S. 939 (1973) 14

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DeTocqueville, *Democracy in America,* Part 2, Book 3, Chs. 39, 40, 41 20

Directory of National Unions and Employee Association, 1975, U.S. Dept. of Labor, Bureau of Labor Statistics 12

Johnston, John, "Sex & Property: The Common Law", 47 N. Y. Univ. 1033 20

PAGE

Kinoy, Arthur, "The Constitutional Rights of Negro Freedom", 21 Rutgers L. Rev. 387 (1967) 18

Matles and Higgins, *Them and Us,* Prentice-Hall, Inc., Englewood, N.J. 1974 15

Myrdal, Gunner, *American Dilemma,* App. 5 20

Northrup, Herbert R., *Organized Labor and the Negro,* Harper & Bros. 1944 14

Perlman, Mark, *Democracy in the International Association of Machinists,* John Wiley & Sons, Inc. 1962 .. 15

Quarles, Benjamin, *The Negro in the Making of America,* McMillan (1969) 14

Ross, Arthur, "The Negro in the American Economy" in Ross & Hill (eds.), *Employment, Race and Poverty,* New York, Harcourt Brace & World (1967) 15

Silverman, Charles, *Crisis in Black and White,* Random House, N. Y., 1964 15

Statistical Abstract of the United States, 1977, U.S. Dept. of Commerce, Bureau of the Census Table #914, p. 560 12

Symposium "Women and the Law," 6 Human Rights Law Rev. 107 20

Woodward, C. Van, *Reunion and Reaction,* Boston, Little & Co. (1951) 18

Worthman & Green, "Black Workers in the New South, 1865-1915", in *Key Issues in the Afro-American Experience,* Vol. II, Harcourt, Brace, Javanovich, (1971), Huggins, Kilson & Fox, (eds.) 14

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BRIEF *AMICUS CURIAE* OF THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Interest of *Amicus**

United Electrical, Radio and Machine Workers of America (UE) is a labor organization as defined by the National

* This Brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of this Court.

Labor Relations Act, 29 U.S.C. §152 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(d). It represents thousands of employees of manufacturers of electrical products and equipment, machinery, appliances and products, machine tools and allied products throughout the United States and Canada, including workers of both sexes and of varied national and racial origin.

The Preamble to the UE Constitution, adopted at the time of the Union's foundation in 1936, states:

> "We, the Electrical, Radio and Machine Workers (UE), realize that the struggle to better our working and living conditions is in vain unless we are united to protect ourselves collectively against the organized forces of the employers.
>
> "Realizing that the old craft form of trade union organization is unable to defend effectively the interests and improve the conditions of the wage earners, WE, THE ELECTRICAL, RADIO AND MACHINE WORKERS (UE) form an organization which unites all workers in our industry on an industrial basis, and rank and file control, regardless of craft, age, sex, nationality, race, creed or political beliefs, and pursue at all times a policy of aggressive struggle to improve our conditions."

It accurately defines not only the objectives of the founders of UE and of the Union itself held throughout its existence but, in the course of doing so, the Preamble also accurately defines the discriminatory and exclusionary practices in the trade union movement which UE has repudiated.

The struggle for equality in the workplace, in the Union's internal affairs and in public life in general has been dominant in the history of UE. Equally dominant in UE's

history has been its struggle for the extension and deepening of the unity among all workers in order to effectively confront the united formations of the employers.

It is because UE believes that the reasonable arrangements negotiated between the United Steelworkers and Kaiser Aluminum and Chemical Corporation (Kaiser) under scrutiny here represented an important measure tending to remove an oppressive inequality visited upon minority workers and advancing the unity of all workers in the aluminum industry that UE is concerned with this case. The two lower courts have struck down the agreement. In doing so they have placed a major obstacle in the way of the Steelworkers and other unions to discharge a duty dictated by their founding principles and by their legal obligations to fairly represent all those who have designated them as their bargaining agents.

The Agreement Between the Steelworkers and Kaiser

In 1974 the Steelworkers and Kaiser entered into a national agreement covering represented employees in 15 of th Company's plants throughout the United States. The part of the national collective bargaining contract relevant here provides in essence that apprentice and craft jobs at each of the plants were to be filled at a minimum of not less than one minority employee for each non-minority employee until a particular goal had been reached. The goal was expected to differ at each plant. The goal established at the Gramercy, Louisiana plant was approximately 40% black craft workers, a percentage proportionate to the black working population in the area.

The Gramercy plant, out of which this litigation arises, opened in 1958. At the time of the 1974 agreement the

workforce employed at the Kaiser Gramercy plant was 14.8% black and only five of the 290 skilled workers at the plant were black.

Kaiser explains the small number of black craft workers at Gramercy in terms of "the unavailability of trained, educated and qualified minorities" (App. 98, 100). Prior to the execution of the agreement Kaiser had filled the vacancies in the craft jobs by hiring from the street those already qualified and trained and these were mainly from the building trades industry (App. 68, 98, 100, 112, 133, 196). However, the Employer had provided on-the-job training in the craft jobs so that represented workers in the bargaining units at each of the 15 plants would have access (App. 101-102, 115, 133-134, 196-197). But in order to secure admission into the on-the-job training program the bargaining unit employee was required to have relevant prior experience (App. 110, 196-197). Thus, the carpenter-painter training program in 1964 was limited to those with a minimum of one year of experience (App. 196) and the training program for the job of general repairman required at least three years of experience, although in 1971 the requirement was reduced by one year (App. 197). The requirement of previous experience eliminated most of the bargaining unit employees from entering into training programs (App. 64, 82, 90, 104-105, 115).

The impact of the pre-1974 arrangements was felt particularly by black workers because the percentage of black workers who had acquired relevant past experience in the crafts before coming to work for Kaiser in the bargaining unit was much lower than the percentage of whites who had acquired such experience due to their historic exclusion from the craft jobs. Of the 28 workers admitted to the Company's pre-1974 craft job training programs, only

two were minority employees (App. 74, 91-92, 110, 135, 146, 162-163, 196-197).

Following the signing of the 1974 agreement as vacancies in the training program arose the Employer filled them on a one for one basis from its existing workforce. For every two vacancies the most senior black bidder and the most senior white bidder were selected and at the time of the trial of this case 7 black and 6 white workers have been selected for the craft job training vacancies (App. 198). All of the black employees selected under the 1974 agreement at Gramercy had been hired as production workers before the Company abolished the "prior experience" requirement and were junior to white workers who had not been selected.

The reasons for which the Steelworkers and Kaiser entered into this agreement are significant. First, a principled interest in eradicating historic discrimination in employment against black workers is of course to be assumed. But there were additional reasons for this contract provision. As put by Judge Wisdom, *Weber* v. *Kaiser Aluminum and Chemical Corporation et al.*, 563 F.2d 216 (5th Cir. 1977) at 228-9:

> Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major

American aluminum producers, Reynolds Metals and ALCOA.

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5 Cir. 1975). The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers.

Thus, a combination of principle and pragmatism occasioned the new agreement. The compulsions of the law performed the vital and valuable function of assisting the struggle for principle. It is clear that the 1974 agreement providing a way in which the unskilled workers of the various production units at the Kaiser plants could gain access to craft jobs and the training therefor would not have been entered into without the presence of Title VII of the Civil Rights Act of 1964 or Executive Order No. 11246, and neither the minority nor majority workers at any of the plants would have acquired this benefit.

The Complaint and the Decisions Below

Weber, a white worker employed at the Gramercy plant, filed the complaint which initiated this litigation, claiming that the Steelworkers and Kaiser had violated his Title VII rights because he had been an unsuccessful bidder for entry in the craft job training program at the Gramercy plant in competition with black bidders with less seniority. He contended that he had been denied rights his seniority entitled him to solely on account of his race. He sued on

behalf of a class embracing Gramercy employees who were members of the Steelworkers Local, who were not members of a minority group and who had applied for or were eligible to apply for on-the-job training programs since the date the national agreement had become effective.

The District Court upheld the complaint and permanently enjoined further application at Gramercy of the 1974 national agreement establishing the training program and defining the qualifications for admission to the skilled crafts.

The District Court decided that prior to 1974 Kaiser itself had not discriminated against minority workers in filling the craft training positions, that, therefore, the contractual provision requiring admission to the skilled crafts and the training program by unskilled workers in the production unit at Gramercy did not amount to a remedy for past employer discrimination and therefore constituted racial discrimination in itself. The trial court said, in *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 at 769:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers

in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

A divided Court of Appeals for the 5th Circuit affirmed *Weber* v. *Kaiser and Chemical Corp.*, 563 F. 2d 216. The court noted that Section 703(j) of Title VII did not require preferential treatment of any minority. It concluded that preferential treatment was also strictly forbidden in response to societal discrimination unless such preferential treatment was embarked upon to restore employees to their rightful place within a particular employment scheme (at pp. 219, 225).

The majority said, at p. 225:

> [6] Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination.* For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII.

The majority affirmed the district court's opinion ". . . on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed" (at 224). The trial court's formulation of the "second ground" referred to in the appellate decision is (at 223):

> "Courts would not mandate a preferential quota system under these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer."

Thus, the two lower courts have held that "societal" discrimination cannot be remedied by a voluntary agreement such as the one negotiated by Kaiser Aluminum and the Steelworkers or by a judicial order. No voluntary affirmative action agreement by a union and an employer will be appropriate under Title VII unless the parties to it can say with assurance that a court would order the same arrangements.

Effectively, these decisions put an end to such voluntary agreements. First, no trade union—or employer—can enter into a contract such as that negotiated between Kaiser and the Steelworkers because there is no way in which they can predict with precision how a court would find.

> Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on

its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult. *Weber* v. *Kaiser Aluminum,* 563 F. 2d at 230 (dissent of Wisdom, C.J.).

Secondly, any union and/or employer will be deterred from voluntarily complying with the mandate of Title VII because, given the position advanced by the two lower courts, they would have to run unacceptable risks.

> The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *Weber* v. *Kaiser Aluminum,* 563 F. 2d at 230 (dissent of Wisdom, C.J.).*

* The freezing effect of the decisions in *Weber* v. *Kaiser Aluminum, et al., supra,* is exemplified by the action of the consent decree court in *United States* v. *Allegheny Ludlum Industries, Inc.*, No. CA74-P-0339-5 (N.D. Ala.), which has issued an order to show cause why changes in that decree are not required since its essence was a collective bargaining agreement between the union and the companies without examination by the court of the circumstances in each of the 250 affected plants. (See Petition for Certiorari, case No. 78-492, filed by the United Steelworkers of America, a defendant below.

ARGUMENT

The Courts Below Committed Error in Determining That a Voluntary Agreement Between a Collective Bargaining Representative and an Employer to Remedy Historic Social Racial Discrimination Violated Title VII.

The only issue to which *amicus* UE addresses itself is whether the courts below committed error in determining that Title VII had been violated by the agreement between the Steelworkers and Kaiser to remedy historic societal racial discrimination, as it affected the workers at a particular plant, which has virtually barred minorities from entering into the skilled crafts.* UE respectfully contends that error has been committed.

First, these decisions place a block in the path of any labor organization which seeks to organize workers in a way which unites them on an industrial basis, with rank-and-file control, and regardless of craft, age, sex, nationality, race, creed or political beliefs (*supra,* at p. 2). These principles of organization must be followed if effective rank-and-file democratic unions are to emerge in this country. Women and minority workers need to know that the union they form has the capacity to combine all workers in a manner capable of confronting employers who themselves are well organized. Ignoring the specific historic societal discrimination experienced by women and minorities in this country, especially in the arena in which labor unions function—on the job—weakens, from its inception, effective combinations of workers seeking to improve their working conditions and wages.

* UE is aware that a powerful argument has been advanced to the effect that the record in this case shows an arguable violation of Title VII by the employer. *Weber* v. *Kaiser Aluminum,* 563 F. 2d, at 230-232 (dissenting opinion of Wisdom, C.J.). This brief does not address that question.

The contract negotiated between Kaiser and the Steelworkers was a useful effort to remove historic societal barriers to the entry of minorities into the skilled craft jobs at the Gramercy plant of Kaiser in a unifying rather than divisive manner. The entry of unskilled white workers into the crafts also was a part of the agreement. The task facing democratic unions which seek to organize workers without invidious discrimination is made difficult enough by the employers. They would be grateful if the courts would refrain from interfering with this legitimate process. The decisions of the courts below constitute such interference.

The reasons which have made it necessary historically for workers to combine into democratic, non-discriminatory labor organizations are as valid today as they ever were. Only 22% of the total work force of this country is organized into trade unions.* This is true at a time when corporate control and economic power has become more and more centralized.** The melancholy experience of the federal courts with J.P. Stevens, Inc. is but the most obvious manifestation of employer resistance to the organization of their workers. *NLRB* v. *J.P. Stevens & Co., Inc.*, 563 F. 2d 8 (2nd Cir. 1977), at pp. 13, 15 and footnotes 1, 2, at p. 13.

While Congress may not look at the question of the organization of workers in the same light as does UE, nevertheless, it has asserted a national policy recognizing the right of employees to organize unions of their own choice. *National Labor Relations Act*, as amended, 29 U.S.C., §151 *et seq.* "Our national labor policy views union

* *Directory of National Unions and Employee Associations, 1975* U.S. Dep't of Labor, Bureau of Labor Statistics.

** *Statistical Abstract of the United States, 1977* U.S. Dep't of Commerce, Bureau of the Census, Table #914 page 560.

membership as a necessary good to most all of working [people]." *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471, 473 (8th Cir. 1973). National policy further requires that labor organizations be democratic (*Labor-Management Reporting and Disclosure Act of 1959*, 29 U.S.C., §401 *et seq.*). Moreover, the courts have held that the privileges which federal law grants to a union as a representative of workers carry with them the duty to represent in good faith the interests of all workers. *Steele* v. *Louisville and N. Rway Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The latter case notes that in fact ". . . the statutory duty of fair representation was developed . . . in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives . . ." *Vaca* v. *Sipes, supra*, p. 177. A union which discriminates on the basis of race has failed to carry out its duty of fair representation and the National Labor Relations Board on constitutional grounds is barred from certifying such a union as a bargaining representative. *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973); *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976); *Hughes Tool Co.*, 147 NLRB #16, 1964.

Thus, both the interests of employees themselves in the organizing process and national policy as asserted by Congress and the courts require that a union be responsive and sensitive to the special concerns of the minority and women workers it seeks to represent.

Second, the methods employed by Kaiser for admitting workers to the craft jobs at Gramercy prior to the 1974 agreement effectively resulted in the exclusion of black workers since their entry into the craft jobs had been in-

vidiously restricted for a very considerable historic period. It is not debatable, in fact, that black workers have indeed been systematically and deliberately denied access to the skilled trades.

The courts below did not challenge this basic fact even though they knew that a fundamental reason for the 1974 agreement between the Company and the Union was precisely this historic societal discrimination. The data permits no other conclusion.* The number of judicial findings of discrimination in the craft jobs demonstrate that the past is present. *United States* v. *Elevator Contractors,* 538 F. 2d 1012 (3rd Cir. 1976); *Associated General Contractors* v. *Altshuler,* 490 F. 2d 9 (1st Cir. 1973), cert. den. 416 U.S. 957 (1974); *U.S.* v. *Wood Wire and Metal Lathers,* 471 F. 2d 408 (2d Cir. 1973), cert. den. 412 U.S. 939 (1973); *So. Illinois Builders Association* v. *Ogilvie,* 471 F. 2d 680 (7th Cir. 1972); *Contractors Association* v. *Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); *Local 53* v. *Vogler,* 507 F. 2d 1047 (5th Cir. 1969).

By the end of the Civil War 83% of the skilled artisans in the South (5 out of 6) were black but by 1900 the black artisans constituted about 5% of the total.**

White artisans, in good part by way of the development of craft unionism and the apprentice system, and in part by way of violence and intimidation, pushed black workers

* See Herbert R. Northrup, *Organized Labor and the Negro,* Harper & Bros. 1944, Tables Ia and Ib, pp. 18, 19.

** Quarles, Benjamin, *The Negro in the Making of America.* New York, Macmillan, 1969; Worthman, Paul B., & James R. Green, "Black Workers in the New South, 1865-1915", in Nathan I. Huggins, Martin Kilson, & Daniel M. Fox (eds.), *Key Issues in the Afro-American Experience, Vol. II,* New York, Harcourt, Brace, Jovanovich, 1971.

out of the skilled trades.* This exclusionary process was conducted both in the North and the South. Before the Civil War opposition to black workers performing the skilled trades was controlled by the slave owners but the pressures to keep blacks out in the North were far more successful. Following the Civil War the exclusionary drive was equally virulent in the North and the South.**

It is obvious that the exclusion of black workers from the skilled crafts was general and did not depend upon identifying specific victims. Nor should the elimination of this misconduct depend upon the identification of specific victims.

The mechanisms for the removal and exclusion of black workers from the skilled trades were many and varied. Some unions by specific provision in their constitutions or rituals limited membership to "white Caucasians". These mechanisms have continued in operation or effect, and the racial composition of the skilled trades today is the result.***

THIRD, the historic exclusion of blacks from the skilled trades is, of course, of particular significance in this case. However, it is but one aspect of the treatment of blacks in this country following what has been called ". . . an unfortunate and ignominious page in this country's his-

* Ross, Arthur M. "The Negro in the American Economy", in Arthur M. Ross & Herbert Hill (eds.), *Employment, Race and Poverty.* New York: Harcourt, Brace & World, 1967.

** E.g. Charles Silverman, *Crisis in Black and White.* Random House, New York, 1964, p. 104.

*** Perlman, Mark, *Democracy in the International Association of Machinists.* John Wiley & Sons, Inc. 1962, pp. 14, 15, 39, 44-46. It should be observed that resistance to the "white Caucasian" ritual existed from the early days of IAM history and was manifest from time to time until its repeal in 1947. Pearlman, *supra,* pp. 15, 39; James J. Matles and James Higgins, *Them and Us.* Prentice-Hall, Inc. 1974, pp. 46-47.

tory". *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), at p. 418.

What is unique about what happened to blacks in this country is that it was the product of national policy and woven into the United States Constitution itself.

Unlike other minorities who came to this country, blacks arrived as chattel slaves uprooted from their own lands, forced into labor and deprived of all legal rights. When the Declaration of Independence was agreed upon by the Founders who declared that it was self-evident that all men are created equal and are endowed with certain unalienable rights including those to life, liberty and the pursuit of happiness, they did not have blacks, women or native Indian people in mind. The United States Constitution explicitly recognized slavery of black people when it provided (a) that a slave was equivalent to three-fifths of a person in connection with the apportionment of Congressional representatives and taxation among the states; (b) limitations on the slave trade; and (c) a fugitive slave clause. Art. I §§2, 9, Art. IV §2.

The various states also enacted measures protecting slavery. Nor was the segregation of blacks confined to the Southern states where the overt forms of slavery were paramount. Northern communities segregated the blacks in numerous ways.

In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856) this Court declared that the Constitution held slaves to be property and that "the right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to

---

* Minorities and women have also been excluded from the craft trades. The Kaiser-Steelworkers agreement speaks of minorities. At the Gramercy plant the affected class consisted of black employees. It is not clear from the record what minorities would have been involved at the 14 other Kaiser plants.

the citizens of the United States . . ." (at 451). This Court further said that blacks were not intended to be included as citizens under the Constitution because they were "regarded as being of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ." (at 407). In rationalizing this conclusion the Court referred to the multitude of segregationist arrangements in the Northern communities such as Boston which demonstrated, according to the Court, the general attitude that blacks were inferior albeit in a setting in which slavery did not exist.

The national policy recognizing and protecting slavery and the rationale for doing so grounded on the claim of racial inferiority was renounced, cancelled and annulled as a consequence of a gigantic social upheavel, the Civil War, and post-war Civil Rights Amendments then passed. These Amendments and the Congressional enactments designed to effectuate them can be regarded as early affirmative actions taken in this country to redress the repudiated slavery policies of the past. The Reconstruction measures, including the establishment of the Freedmen's Bureau and the arrangements whereby blacks could secure land and find the economic basis for surviving, all were affirmative actions designed to give meaning to the otherwise paper freedom provided by the Amendments and the statutes. To eliminate slavery as the condition of life of blacks it was necessary, from the moment the Civil Rights Amendments were passed, to systematically carry on the process of eliminating the badges and indicia of slavery, i.e., every form of racially based segregation and discrimination.

It is painful to assert that this Court played a central part in not only blocking these efforts but in actually as-

sisting the reimposition of bondage in new forms. *Civil Rights Cases,* 109 U.S. 3 (1883). The Supreme Court's decision placed a judicial *imprimatur* upon the political compromise of 1877 whereby the leading financial and political forces in the country reached agreements which resulted in the designation of a President, fundamental, economic and political arrangements for the future control of the country, and the turning over of control of the blacks to the white supremacists of the Southern states.* The Court's decision in the *Civil Rights Cases* annulled Congressional civil rights statutes which gave practical expression to the national policy which affirmatively recognized that blacks were human beings and were entitled to all the rights of citizens, and were needful of specific affirmative actions designed to overcome the badges and indicia of nationally sanctioned slavery including equal access to public places. The majority of the Court said that the guaranteeing of the right of citizenship to the blacks was primarily a matter for the states. The federal government had no role except to correct any actions by the states which infringed upon the citizenship rights of blacks. Private infringements were not within the federal cognizance. Thus, of particular interest in this case, black artisans were thereupon denied legal protection against exclusion from their crafts with consequences which are now apparent in Gramercy, Louisiana (*supra,* pp. 4, 14-15).

Thirteen years later this Court gave full recognition to segregation. *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). In doing so it misunderstood historical realities as it also had done in the *Civil Rights Cases.* The majority in each of the two cases assumed that black people were socially,

* C. Van Woodward, *Reunion and Reaction,* Boston, Little & Co. (1951); Arthur Kinoy, the *Constitutional Rights of Negro Freedom,* 21 Rutgers L. Rev. 387 (1967).

economically and politically equal with all others. In *Plessy* the Court said, at 551 (16 S.Ct. at 1143):

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

Justice Harlan, dissenter also in the *Civil Rights Cases,* saw more clearly and pointed out in *Plessy* that the real meaning of the Louisiana law which required railroads to maintain "separate but equal" facilities for blacks and whites (and the construction placed upon it by the Court) was that black people were so inferior and degraded that they could not be permitted to sit in the same cars as white. In short, the badges and indicia of slavery as well as its underlying justification as asserted in *Dred Scott* were being restored judicially with these decisions.

More recently it became possible to suppose that, with a half century of history, the Supreme Court has begun to see the reality of race relations in the United States more clearly. *Brown* v. *School Board,* 347 U.S. 483 (1954); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). The decision in this case may indicate whether the Supreme Court, in the last quarter of the 20th Century, will insist on following the line taken in the last quarter of the 19th by the *Civil Rights Cases* tribunal on the basis of historical misunderstanding or will at last affirm federal responsibility for finally eliminating all vestiges of slavery in this country.*

* Women constitute another group who have faced legal institutional discrimination. That is, the disadvantages to which

FOURTH. There is a direct causal connection between the abandonment of the national commitment to eradicate all of the vestiges of slavery and the present position of black people in this country. This Court, of course, knows of what that position is and most recently has been advised of it by Mr. Justice Marshall in his opinion in *Regents* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733 (1978) at 2802:

> A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.
>
> When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male

they have been subjected were not simply attitudinal. *DeTocqueville, Democracy in America, Part 2,* Book 3, Chapters 39, 40, 41; Gunner Myrdal, *American Dilemma,* Appendix 5; Johnston, John D. "Sex and Property! The Common Law" etc. 47 New York Univ. L. Rev. 1033; "Symposium: Women and the Law" 6 Human Rights L. Rev. 107. It has been suggested that the federal government also has a special responsibility toward the eradication of all forms of discrimination which have disadvantaged women because there has been a national policy and practice which has protected this discrimination.

> who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

FIFTH. If it is true that the Equal Protection Clause was "virtually strangled in its infancy by post-Civil-War judicial reactionism", *The Regents* v. *Bakke, supra* (opinion of Justice Powell, at 2749), it does not follow that this Court is bound to continue the suffocation. The malady—race discrimination as a vestige of slavery—remains. Moreover, this Court has left open a review of Congressional legislation grounded on §2 of the 13th Amendment and §5 of the 14th Amendment. *Regents* v. *Bakke, supra,* at p. 2755, fn. 41; *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

We are aware that other *amici* briefs will argue the 13th Amendment grounding for finding the Kaiser-Steelworkers agreement to be in keeping with the mandate of Title VII. We commend the Court's attention to that discussion.*

CONCLUSION

Prior to the execution of the 1974 Agreement unskilled production workers at Kaiser's Gramercy plant were effectively excluded from entry into the skilled trades jobs. Black workers in particular were excluded because of the historic bar to their admission into those jobs. It was the particular responsibility of the Steelworkers to attempt to penetrate the barriers. The pressures generated by the Labor Department's Office of Contract Compliance, operat-

* See the brief *amici curiae* of the Affirmative Action Coordinating Center, et al.

ing pursuant to Presidential Executive Orders, and the possibility of litigation under Title VII was of aid to the union and made the solution embodied in the 1974 contract possible. As this Court said in *Albemarle Paper Co.* v. *Moody, supra*, at 417-418: "It is the reasonably certain prospect of a back pay award that provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Voluntary action to remedy past discrimination is the object of Title VII. *EEOC Guidelines on Affirmative Action*, Jan. 11, 1979.

The specific exclusion of black workers from the skilled trades was accomplished in great measure by the acts and rules of admission of the craft trade unions. The Supreme Court's destruction of the statutory protections devised by Congress to prevent precisely what happened with respect to the skilled trades and in a broad spectrum of social, political and economic areas resulted in a segregated society in which the black people of the country were forced into positions of inferiority and deprivation solely on account of their race. And all this was done despite the mandate of the post-Civil War amendments which had committed the nation to a rejection of the notions of racial superiority which provided the rationale for slavery.

History, looked upon as reality and not simply fable agreed upon, required a different reaction by this Court from that found in the *Civil Rights Cases* and *Plessy* v. *Ferguson*. The consequences of the political and judicial decisions taken in the last quarter of the 19th Century are obvious today. The continued exclusion of black workers from the skilled crafts is but one of them.

To hold that Title VII prohibits an arrangement which affirmatively provides for the admission of minority workers into the skilled trades—along with unskilled white workers—once again is an announcement that there is no federal responsibility for eliminating racial discrimination, the vestige of slavery which continue to besmirch our society.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA,

Petitioner,

VS.

BRIAN F. WEBER,

Respondent.

AMICUS BRIEF OF THE WOMEN'S CAUCUS, DISTRICT 31 OF THE UNITED STEELWORKERS OF AMERICA

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INTEREST OF THE AMICUS CURIAE

This brief, as amicus curiae, is filed on behalf of the United Steelworkers of America (USWA) District 31 Women's Caucus ("Women's Caucus"). District 31 encompasses the greater Chicago-Gary geographic area and is the single largest USWA district in the United States. The Women's Caucus is not an official body

within the USWA, but is an *ad hoc* grouping of women who work in plants where the collective bargaining representative is the USWA. The views set forth in this brief do not purport to reflect the official position of the USWA either in this case or on the policy issues inherent in this controversy.

The interest of the Women's Caucus in the present litigation is to assure that voluntary affirmative action plans may be entered into between companies and union representatives where the underutilization of women is both apparent and undisputed. Some of the members of the Women's Caucus work for employers now covered by the consent decree in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The continued legality of even that decree may be in doubt because of the opinion of the Court below.[1] Others work for companies that, like Kaiser, have voluntarily adopted affirmative action plans modeled upon the *Allegheny-Ludlum* plan. The judgment of the United States Court of Appeals for the Fifth Circuit in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1978), suggests that any voluntary affirmative action plan must be predicated upon a prior judicial determination of Title VII liability or an admission of past discrimination by the employer. Still other members of the Women's Caucus work at plants not presently covered by any affirmative action plan. They have an interest in seeing the judgment below reversed because

[1] The validity of the *Allegheny-Ludlum* affirmative action plan is called into question because there was no plant-by-plant analysis in that case to determine whether discrimination had occurred or whether the industry-wide plan was tailored to each individual employment situation.

they wish to have a similar plan negotiated between their employer and the USWA.

Each of the Women's Caucus members has an immediate and direct interest in seeing the concept of voluntary compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, implemented through negotiated affirmative action plans where underutilization of women in the employer's work force exists. Each has an immediate and direct interest in avoiding the protracted delays attendant upon the filing of individual EEOC complaints and federal district court litigation to vindicate their civil right to fair and equitable access to jobs.

The Kaiser-USWA affirmative action plan at issue here provides that 5% of the craft training positions are to be made available to women. The Women's Caucus recognizes that limited as this provision is, it provides the only assurance for industry-wide change and the beginnings of effective access to craft jobs for women without recourse to case-by-case litigation. Without even so minimal a provision for entry into craft training positions, the day of equal access for women in well paying industrial jobs, less strenuous than assembly line work, will be indefinitely postponed.

This brief of *amicus curiae* is filed with the consent of all the parties to Case No. 78-432.[2]

[2] Kaiser, Petitioner in No. 78-435, has also consented to the filing of this brief. No response, approving or disapproving of the filing of this brief has been received from the United States, Petitioner in No. 78-436.

ISSUE PRESENTED FOR REVIEW

May an employer and a union voluntarily negotiate an affirmative action plan that reasonably remedies substantial and uncontested underutilization of minorities and women by that employer in the absence of either an admission or a judicial determination that the employer has been guilty of past discrimination?

SUMMARY OF ARGUMENT

Congress has found that the historic existence of discriminations based upon race, religion, sex, or national origin justifies, as a matter of national policy, prophylactic, voluntary affirmative action plans to assure that such discriminations will not continue into the future. Although Congress provided that *bona fide* seniority systems need not be adjusted to accommodate minorities, it did not prohibit negotiated modification of seniority to provide job access to previously excluded groups.

This Court, in interpreting the intent and scope of the Civil Rights Act of 1964 in general and of Title VII in particular, has repeatedly admonished that conduct seemingly neutral on its face must be measured in terms of its actual racial or sexual impact. This Court has said that the reach of the Act must be prospective as well as retrospective. The Act seeks not only to accord restorative justice to individuals actually harmed by an employer's past discriminatory wrongs. It seeks also to assure that discriminations against entire groups of individuals will not continue into the future.

Given existing substantial underutilization of minority groups in employment, given the national policy of fair and equitable access to jobs without regard to race, religion, sex, or national origin, and given the goal of full utilization of all groups in the national workforce, no plan can be devised, at this moment in time, that in its *impact* is totally neutral with respect to all competing groups. Accordingly, any voluntary affirmative action plan cannot be tested on the basis of whether it is totally neutral racially or sexually. Such neutrality of impact is in all events not possible in a situation where discrimination already exists—whether that discrimination has been caused by historic societal attitudes or the particular conduct of a given employer. Moreover this Court has already, repeatedly, and most recently in *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896 (1978), recognized that, given the appropriate circumstances, race and sex may be *a* factor in determining access to a scarce benefit. Therefore, the validity of any plan implemented in the context of existing underutilization must be tested not on the basis of whether race or sex constitute one of many factors in the method of selecting individuals for a job benefit, but rather whether that plan impacts unfairly, inequitably and unreasonably upon competing groups.

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit was in error and should be reversed for the following reasons:

1. It imposes a *de facto* requirement that either an official determination or an admission of past discrimination must be made, on a plant-by-plant basis, as a prerequisite for the implementation of a voluntarily negotiated affirmative action plan. As a result, it effectively thwarts the voluntary achieve-

ment of the aims of Title VII and assures the continuation of present employment underutilizations based on race and sex.

2. It implicitly and erroneously holds that no single factor out of an entire panoply of contractually negotiated seniority rights may ever be modified by an employer and a union and that a racially or sexually conscious selection method may never be employed for purposes of determining equal access to a new job benefit.

3. It accepts as adjudicated fact, in the absence of genuinely adverse parties in respect to that issue, and relies upon the ultimate legal conclusions that there was no discrimination of any kind, in any respect, at any time at the Gramercy plant and that the plant's seniority rosters are, therefore, free of any discriminatory taint.

For these reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

ARGUMENT

I.

VOLUNTARY EFFORTS BY EMPLOYERS AND UNIONS TO REMEDY SUBSTANTIAL AND UNCONTESTED UNDERUTILIZATION OF CERTAIN GROUPS IN THE EMPLOYER'S WORK FORCE ARE PERMISSIBLE UNDER TITLE VII EVEN IN THE ABSENCE OF AN ADMISSION OF PAST DISCRIMINATION AND EVEN THOUGH A COURT MIGHT NOT ORDER SUCH A REMEDY IN A TITLE VII ACTION.

The underlying purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is to establish a national policy that continuing vestiges of historic discriminations in employment based upon race,

religion, sex or national origin and the economic and social disabilities that flow from such discriminations will be eradicated. Mr. Justice Powell, in *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896, at 4907, n.44, observed that the enactment of Title VII was based upon:

> "[L]egislative determinations . . . that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.
>
> " '[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.' [Citation omitted]."

The central purpose of the Act, however, is not merely, as the Court below suggests, restorative or compensatory justice for specific wronged individuals after a judicial determination that discrimination has occurred at a specific place of employment. The intent of Congress was that every reasonable means be used to ensure that the effects of discrimination not continue into the future and that the existing underutilization of women and other minority groups in the work force be remedied. Accordingly, the policy objectives of Title VII go well beyond the fashioning of judicial remedies in the form of back pay awards and adjustments to seniority for specifically identifiable individuals after a case-by-case determination that discriminatory conduct has occurred at a particular place of employment.

To correct past and prevent future discrimination, Congress placed primary emphasis in Title VII on

voluntary, private actions. As this Court stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973):

> "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. [Citations omitted.] *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.*" (Emphasis added).

And in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975), this Court recognized that the judicial sanctions and remedies in Title VII were primarily intended not as punishments for past misconduct or even as compensatory relief for past harms suffered. Rather their ultimate purpose was to encourage private parties to correct past abuses voluntarily and to see that they did not reoccur:

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions *to self-examine and to self-evaluate their employment practices and to endeavor to eliminate,* so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States v. N. L. Industries, Inc.* 479 F.2d 354, 379 (8th Cir. 1973)." (Emphasis added).

The ruling of the Court below undercuts the thrust of the decisional law in this Court by effectively destroying the possibility of the voluntary adoption of remedial affirmative action plans by employers and unions.

The Court below would not permit reasonable, fair and voluntary efforts to remedy perceived, uncontested and substantial underutilization of minority groups and

women in industry. Instead, the Court would require an admission by an employer that he has discriminated in the past—an improbable eventuality given the likelihood of Title VII suits following any such announcement.[3] Alternatively, the employer and the union run the risk that a Court in any reverse discrimination action would not find sufficient discrimination to justify the affirmative action that was undertaken. As a practical matter, if the Court below is affirmed, employers and unions that wish to remedy the underutilization of females and minorities will, to protect themselves from Title VII liability, have to bring declaratory judgment actions and obtain a judicial determination that past employment discrimination justifies the use of race or sex as one factor in distributing employment benefits. That prospect is an unlikely as is the voluntary admission of past discriminatory conduct by the employer because it too will expose the employer to backpay awards.

Courts have long recognized that substantial underutilization of a minority group is often a conclusive indication that discrimination has occurred. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). As this Court recently said, underutilization is often a:

> "[T]elltale sign of discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result

---

[3] Indeed it is unclear whether any such admission would in all events be sufficient in the view of the Court below to permit affirmative action. Employees such as Brian Weber would surely argue, as they implicitly have done here, that only a federal court can determine whether an employer has violated Title VII.

> in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20 (1977).

See also Dothard v. Rawlinson, 433 U.S. 321 (1977) where this Court confirmed that if the relevant labor market was 36.89% female, but employees were only 12.9% female, a *prima facie* case of discrimination could be established.

The underutilization of women and blacks at the Gramercy plant, both in the general unskilled labor pool from which bidders for the newly established on-the-job training benefit were to be drawn and in the craft positions, is as substantial as it is undisputed. Although the area workforce was 39% black, blacks comprised only 10% of the unskilled Gramercy labor force until 1969 when a one-to-one racial hire ratio was instituted at the gate at the urging of Kaiser's federal contract compliance agency. (Kaiser Petition for Writ of Certiorari, p. 3). There is no indication in the papers available to *amicus* what percentage of the surrounding area work force are women, but women constituted only 5% of the unskilled labor pool at the Gramercy plant in 1975 (District Court, Exhibit No. 4). Nor is there any indication whether any actions were undertaken by Kaiser to remedy its underutilization of women in the unskilled labor force at the Gramercy plant.

At the time of trial blacks constituted 14.8% of the Gramercy plant's general work force. The percentage increase was well under 1% a year. Assuming the same rate of turnover that existed from 1969 to 1975 continues into the future, it will take 36 years or until the year 2011 for the black work force at Gramercy to

reach the 39% that reflects the black work force of the surrounding area. (District Court, Exhibit 4). And given the same rate of turnover, if a one-to-one male-for-female ratio of hire at the Gramercy plant gate is instituted, it would take 56 years or until the year 2031 for the Gramercy unskilled work force to be equally divided between men and women.

Blacks and women were even more markedly underutilized in the 290 craft positions at Gramercy. Blacks filled only 5 of the slots; women none. (District Court, Exhibit 4; Kaiser Petition for Writ of Certiorari, p. 3.) If seniority is to be the sole factor determining access to on-the-job training, equal access to craft positions for blacks and for women will be indefinitely postponed.

It is in the light of this substantial and uncontested underutilization of minorities and women in the Gramercy plant craft jobs that the reasonableness and fairness of any voluntary affirmative action plan must be tested. Where substantial underutilization is found, there is every reason to believe that past discrimination has caused the numerical imbalance. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In such instances, the voluntary efforts of employers and unions to take reasonable steps to remedy this imbalance can only be viewed as furthering the goals of Title VII. Employers and unions should not be forced, for their own protection, to await a judicial determination that the employer has in fact discriminated as a prerequisite for the implementation of a voluntary affirmative action plan in such circumstances.

Ours is a time of enormous change. It has become increasingly problematic for any woman to be financially dependent upon a man. Whether we as individuals approve or deplore these changes, the facts remain that

divorce and widowhood are frequent. Alimony payments are less common. Child support has become increasingly difficult to collect even where the divorce court has awarded it. Often women are the sole source of support for their families. And even the most traditional and middle class of families has found that in times of rapid inflation a single breadwinner is often inadequate. Economic and social pressures have eroded the American family idyll of the post-war years.

Numbers document the changes in work patterns and in the composition of the work force. The number of women holding jobs has grown from 18 million in 1950 to 42.1 million in 1978, an increase of 129% during a time when the total work force grew only 61.7%.[4] In spite of the overwhelming influx of women into the labor force, on the average women earn proportionately *less* today than they did 22 years ago. In 1955, full-time women workers earned 64% of what full-time men workers did. By 1977 full-time women workers earned only 58.9% of what full-time men workers were earning. In 1977 the median annual income for full-time male workers was $14,626; for full-time women workers it was only $8,618.

Furthermore, 1 in 7 or 14.4%, of all American families are now headed by a woman. These families are also the poorest in our country. Where the median family income in America in 1977 was $23,945, the median family income for female-headed families was only $7,977.

Congress with the passage of Title VII of the Civil Rights Act of 1964 enacted into law the principle that

[4] Compiled by the National Commission on Working Women from U.S. Dept. of Labor and Commerce statistics as of September 1978. The complete statistics are set forth in the Appendix for the Court's convenience.

fair access to jobs cannot be predicated on gender. Without the adoption by employers and unions of easily administrable and objective mechanisms to assure compliance with that law, women will continue to be relegated to lower paying, lesser status jobs and the poverty that those jobs entail. Only the voluntary adoption of reasonably drawn affirmative action plans can assure women full and rapid integration into the American work place and make real for them the promise of Title VII that discrimination on the basis of sex will not be tolerated.

The effect of the opinion below is that women will be forced to rely on slow, expensive, and case-by-case litigation to obtain access to jobs that, but for discriminatory barriers, they would have occupied years ago. EEOC charges and court actions will be more numerous; delays extensive; results inconsistent; the cost in judicial resources enormous. Neither justice nor national policy will be served.[5] By erecting these roadblocks to voluntary compliance, the Court below thwarts the realization of the goals of Title VII. It destroys the very mechanism that Congress viewed as the most effective means of fulfilling those goals.

The spirit and the intent of Title VII are clearly furthered by the uncoerced implementation of reasonable affirmative action plans carefully designed to accommodate competing claims of individuals while ameliorating the undisputed and continuing exclusion of

[5] As an example, in *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), involving a sister plant to Kaiser's Gramercy facility, the plaintiff was issued a right to sue notice by the EEOC in 1967. The case was not tried, however, until 1973. The Fifth Circuit reversed the entry of judgment for the employer in 1978, nearly 11 years after the administrative process had ended.

females and minorities from certain jobs. The invalidated Kaiser-USWA affirmative action plan fulfilled the purposes of Title VII with a minimum of compensatory harm to competing white males. The holding of the Court below to the contrary should be reversed.

II.

CONTRACTUAL RIGHTS, INCLUDING SENIORITY BENEFITS, MAY BE VOLUNTARILY ADJUSTED IN NEGOTIATIONS BETWEEN AN EMPLOYER AND A UNION, ACTING IN GOOD FAITH AND REASONABLY REPRESENTING THE INEVITABLY COMPETING INTERESTS OF ITS MEMBERS.

There are two premises that guide the opinion of the Court below. One premise is that, if a court in fashioning a remedy in a Title VII action might not employ a race conscious selection method, then an employer and a union may not voluntarily do so either.[6] The other premise is that seniority benefits that might be predicated upon seniority must be so predicated, regardless of the fact that there are other desirable societal ends to be accomplished or that the competing interests of the members of a union must be accommodated. It is respectfully submitted that both premises are in error.

[6] There are instances where under Title VII, a court may not award relief: *e.g.*, where no timely complaint has been filed with the EEOC, *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); where victims of discrimination cannot be specifically identified, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); where the discrimination was pre-Act, *Id.*; where discrimination continues only because of the operation of a *bona fide* seniority system that pre-existed in respect to the available benefits. *Id.* Clearly, however, none of these decisions stand for the proposition that employers and unions may not voluntarily provide remedies for the perpetuation of discrimination where a court may not do so.

The Court below suggests that private parties have no more, and indeed may have less, scope of action than a court does in seeking to ameliorate the existing exclusion of certain groups from the work force. As Judge Wisdom in his dissent suggests the test for approving a voluntary affirmative action plan should not be whether a court might or might not grant Title VII relief. The rule of law can only be that where underutilization is uncontested and consequently past discrimination is likely to have occurred, race and sex may be used as one of many factors to select job applicants in order to remedy that underutilization.

Nothing in either Title VII or the decisions of this Court suggests that employers and unions are powerless voluntarily to adopt affirmative action plans to remedy existing employment inequities. Such a conclusion would mean that white, male employees, who have benefited from the underutilization of females and minorities, have acquired the equivalent of vested rights that can not be changed by the voluntary actions of employers and unions in collective bargaining agreements.

Yet Brian Weber has no vested right to have selection for the craft training program made on the basis of either seniority or any other particular selection method.[7] Only if this Court is prepared to hold that selection by lottery from two separate pools would also violate Title VII in this case can Brian Weber hope to prevail. For the Court of Appeals has implicitly held

[7] Indeed, Brian Weber has not claimed that he has rights arising from Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). That Section provides that *bona fide* seniority systems that may retard the speedy entry of minorities and women into the work force need not necessarily be changed. It does not mandate that all benefits that might flow from seniority must be contingent upon seniority alone.

that where seniority might have been the sole determinant for allocating a new job benefit, it must take precedence over any accommodation as to race or sex that would remedy underutilization. Only if all aspects of industrial seniority are deemed, for all purposes, to be incapable of modification by a union in an effort to remedy historic patterns of discrimination can Brian Weber's claim that equal access to a new benefit on the basis of multiple seniority pools constitutes reverse discrimination against him as a white male prevail. If the Court is prepared to concede that applicants for the new job benefit could have been chosen from multiple pools based on lottery, then the mere fact that seniority within each group is also made a factor in determining selection becomes totally non-dispositive. The Court of Appeals has in effect accepted the argument, as did the District Court, that seniority must take precedence over race and sex in selecting applicants for a new job benefit.

The District Court tacitly recognized that it was according plant seniority a protection not required by Title VII. At the very beginning of its opinion the District Court concedes:

> "This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. [Citations omitted]." *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 765 (D. La. 1976).

Yet, having admitted that seniority is a fragile reed indeed upon which Brian Weber's claim of greater entitlement rests, the District Court, without analysis of

the consequences, accepted the proposition that seniority must take precedence for the allocation of all benefits even where the underutilization of minority groups and women is uncontested. The Court of Appeals followed suit without considering the impact of its invalidation of the Kaiser-USWA plan nor the impact that the use of seniority alone as a selection method would have on the perpetuation of discrimination against blacks and females at Gramercy.

Seniority is not a fixed, unchanging concept in the industrial context. Seniority is whatever the union and the employer, through collective bargaining, define it to be for the allocation of whatever benefits they agree upon. Although this Court has said that a court may not adjust *bona fide* seniority rights merely because they provide a disproportion benefit to a given class of workers, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the converse proposition that a seniority system can never be voluntarily modified by an employer and a union, negotiating on behalf of all of its members, does not hold.

The cases decided by this Court in the context of challenges to negotiated adjustments to seniority provide ample precedent for the proposition that seniority rights are valid subjects for collective bargaining agreements and that unions may take any number of issues into account in negotiating modifications in the order of seniority or in the benefits that derive from seniority rights. *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

In *Aeronautical, supra,* this Court held that in order to effectuate the underlying purposes of collective bargaining shop stewards and union chairmen, with less seniority, could be given seniority preference, by collective bargaining, over veterans in spite of the provisions of the Selective Training and Service Act of 1940, as amended, 50 U.S.C. § 308, that provided that servicemen were not to be penalized in their seniority status as a result of their military service. Remarking on the multiple possible variations, definitions, and factors to be considered in determining seniority, the Court concluded:

> "All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining." 337 U.S. 521 at 526.

It is inconceivable that the seniority rights of servicemen, explicitly protected as they were by statute, should be adjustable to accommodate union personnel, but that seniority rights may not be adjusted to accommodate the principle of equal racial and sexual access to a newly created job benefit in order to remedy uncontested underutilization of excluded groups of individuals.

No adjustment for an excluded minority is ever possible in a world of scarce resources without some diminution in the benefits that would otherwise be enjoyed by the heretofore privileged majority. The paradox in the instant case is that no vested right is being taken away from Brian Weber's class of white males. The benefit for which individuals from each racial group are now bidding in the order of their seniority within their group did not exist prior to the negotiation and adoption of the voluntary affirmative action plan here at issue. Prior to the adoption of the very collective bargaining agreement he now attacks, Brian Weber had no more expectation of access to the Gramercy craft positions than any black or female bidder for that position. Weber is not being divested of his rightful place in order to make room for a black or a woman. He is being asked to compete on a one-to-one basis for access to a benefit that prior to 1974 he had no expectation of obtaining.[8] Nor is there any indication in the record whatsoever that any other of the benefits that flow from Brian Weber's seniority rights have in any manner been modified or adjusted to compensate blacks or women for past discrimination.

The Kaiser-USWA plan guarantees entry to job training positions on a one-to-one ratio in order of seniority within each pool.[9] Weber's alternative plan would make seniority the sole determinant. The consequence of using seniority as the sole selection factor would be that no blacks or women would be admitted into the training program in the first year or indefinitely thereafter.[10] In return for having access to these positions for the first time, Brian Weber's class is being asked to share the opportunity to enter the program with equally well qualified blacks and women who may happen to have lesser seniority.

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[8] Even after the plan was instituted only 13 of 35 craft slots were filled from within the plant. 22 were filled by hire outside the plant. White males still obtained 27 of the total craft positions, black males only 7. There is no indication if women received any of the slots. (Trial transcript 59). Arguably that disproportionate impact of craft hiring upon blacks and females itself constitutes *prima facie* evidence of continuing racial and sexual discrimination.

[9] Kaiser wished to make access to the new job benefit available without regard to seniority at all. The insistence of the USWA, seeking to protect older white employees, resulted in the incorporation of the seniority provision. (Trial transcript 108).

[10] USWA Petition for Writ of Certiorari, p. 7.

It is precisely this weighing and balancing of relative advantages and disadvantages to various constituent groups of its membership that unions have traditionally been able to undertake through the collective bargaining process. As this Court said in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 388 (1952):

> "Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents*, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (Emphasis added).

It is in the context of that admonition that the impact of the two competing plans, that negotiated by the USWA and Kaiser and the strict seniority approach of Weber, must be evaluated. There can be no question but that the plan adopted by the USWA and Kaiser best accommodates the competing needs of all of the union's members, black and white, male and female.

The primacy placed on seniority by the Court below, on the other hand, would assure that for an indefinite time white males would be entitled to all of the Gramercy plant's craft training positions. That pattern would continue into the future until the seniority pools would themselves become more equalized on the basis of race and sex. This Court has held that courts have not only the power, but the duty to render decrees that "eliminate the discriminatory effects of the past *as well as bar like discriminations in the future.*" (Emphasis added). *Louisiana v. United States*, 380 U.S. 145, 154

(1965). And in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Court said:

> "The Act proscribes not only overt discrimination, but also practices that are fair in form, but *discriminatory in operation.*" (Emphasis added).

See also United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Surely a union and an employer must not be penalized for good faith, reasonable efforts to obtain this same result.[11]

It is respectfully urged that the Court below, in overlooking the marked impact that a plan based on seniority alone would have on indefinitely continuing the underutilization of blacks and women in the craft positions at the Gramercy plant, has used the letter of Title VII to eviscerate its spirit.

III.

THE CRUCIAL FINDING THAT NO DISCRIMINATION EXISTED AT THE GRAMERCY PLANT CANNOT BE UPHELD BECAUSE OF THE ABSENCE OF ANY GENUINELY ADVERSE PARTY WITH RESPECT TO THAT ISSUE.

It is the position of the Women's Caucus that findings of past discrimination by an employer at a given plant are not an essential prerequisite for the voluntary adoption of an affirmative action plan. Should this Court deem that Brian Weber's class is entitled to preferential entry to a new job benefit because he happens to have seniority, then it is the position of the Women's Caucus that Brian Weber's seniority position at Gramercy is in

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[11] If the ruling of the Court of Appeals is correct, some members of Brian Weber's class presumably can obtain back pay damages.

all events discriminatorily tainted and that it was plain error to have found to the contrary. The equitable appeal of Weber's position can only be maintained if there is a finding that he has not been the beneficiary of past discrimination directed at other groups of competing employees or would be employees.

The finding of no prior discrimination at the Gramercy plant is in all events a legal conclusion, reviewable by this Court. *Cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). But whether it be denominated a factual finding or a legal conclusion from which legal and equitable liabilities and remedies may flow under Title VII, no such finding can be made in the absence of genuinely adverse parties with respect to that issue.

As Judge Wisdom remarked in his dissenting opinion, none of the parties to the litigation had the least interest in seeing the trial court make a determination that discrimination had occurred either in craft hiring or in the hiring of the unskilled labor force at the Gramercy plant. Kaiser could not concede discrimination either in its craft hiring or in its hiring of the unskilled labor force without courting a back pay class action brought on behalf of its black or female employees. Weber could not permit such a finding to be made without destroying the essential prerequisite for his claim to greater entitlement on the basis of seniority alone. The USWA could not squarely raise the issue without running the dual risk of perhaps being collusively liable for any past discriminations of the employer and alienating the majority of its membership.[12]

[12] Brian Weber himself is the chairman of the local USWA grievance committee and is a member of the local's negotiating committee. His own claim of seniority is junior to that of 35 to 40 other unsuccessful white, male bidders for craft training positions. (Trial transcript, p. 94).

Both the District Court and the Court of Appeals permitted the adjudication of this issue where the genuinely adverse parties—blacks and women—were neither parties to the litigation nor directly before the Court. No adjudication can be made that effectively operates to preclude the rights of parties neither before the Court nor directly represented. Such preclusion without representation violates principles basic both to common, statutory, and constitutional law.[13]

Rule 19(a) of the Federal Rules of Civil Procedure provides that:

> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

There is no doubt that blacks and women workers at Gramercy are so situated that they both claim an interest in the subject matter and that their ability to protect that interest is now severely impaired. Their joinder would have been feasible and would not have divested the court of jurisdiction. Where, as here, the judgment below, for all practical purposes, has the effect

[13] It is no answer to suggest, as Brian Weber seems to in his response to the petitions filed in this Court, that black or women workers at the Gramercy plant had a duty to intervene in the litigation since they should have known the lawsuit might result in the preclusion of their basic civil rights. Weber's Brief in Opposition, p. 20 *et seq.* It is the duty of the parties to join any persons not present before the Court whose rights are to be definitely determined. Federal Rules of Civil Procedure, Rule 19(a). Alternatively it is the duty of the Court to refuse to proceed to so crucial a threshold finding that is dispositive of the rights of absent parties.

of *res judicata* upon the absent individuals, they, in all good conscience, should have been before the Court. *Provident Bank v. Patterson*, 390 U.S. 102 (1967). *Cf. LeBeau v. Libby-Owens-Ford Company*, 484 F.2d 798 (7th Cir. 1978).

Two possible types of discrimination should have been at issue in the trial court: discrimination in craft hiring and discrimination in the hire of the unskilled labor force prior to 1969. A finding of discrimination in craft hiring would have justified the judicial imposition of the affirmative action plan invalidated here. A finding of discrimination in the hiring of the unskilled labor force would have operated to taint the pre-1969 seniority rosters upon whose non-discriminatory purity Brian Weber's class relies to establish their claim of prior entitlement. Yet it was in the interest of all of the parties before the trial court that neither finding of discrimination be made.

Moreover, the issue of whether Kaiser discriminated in its hire of craft workers at Gramercy was permitted to hopelessly obscure the far more significant fact that Brian Weber is laying claim in all events to a priority based upon a tainted seniority roster.[14]. The District Court made, and the Court of Appeals let stand, the finding that no discrimination occurred at the Gramercy plant from 1958, when the plant opened its gates, to 1975, when the case was tried. Yet the facts themselves are not in dispute. They directly and uncontrovertedly contradict the legal conclusion that no discrimination occured at any time or in any respect at Gramercy.

[14] Nothing in the record addresses the issue of whether Kaiser discriminated in its hire of women and therefore whether the affirmative action plan that provides them with access to 5% of the craft jobs can be justified even under the theory of the Court of Appeals.

Until 1969, when a one-to-one hire of blacks and whites at the Gramercy plant was begun, blacks made up only 10% of the work force. Whatever method of hire Kaiser utilized prior to 1969 had a decidedly and undeniably discriminatory impact upon blacks. The record is totally barren with respect to Kaiser's hiring methods for both blacks and women in the pre-1969 era or for unskilled women at the Gramercy plant thereafter. Kaiser apparently has had no difficulty in obtaining substantial numbers of well-qualified blacks for its unskilled work force since 1969.

The conclusion is inescapable that whatever method of hire was used in respect to the unskilled labor force prior to 1969 was discriminatory. Brian Weber was hired in the pre-1969 era, *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. at 463, and is himself, therefore, the beneficiary of whatever undisclosed, unknown, and judicially ignored hiring practices were in effect before 1969, whose discriminatory impact upon the Gramercy unskilled labor force is neither disputed nor explained.[15] The District Court erroneously accepted mere statements of good faith on the part of Kaiser as proof of non-discrimination. Good faith and good intentions do not constitute defenses to a charge of discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

On the uncontested facts, the legal conclusion that discrimination has occurred from the adoption of the Act to 1969 is inescapable, and the finding that no

[15] Moreover, we have no way of knowing whether any of the blacks now at Gramercy attempted to obtain unskilled jobs at the plant prior to 1969, but were refused. Mr. Weber's Brief in Opposition, p. 20 *et seq.* contends that none of the parties raised that factual issue. Of course not. The interested parties were not before the Court.

discrimination occurred at the Gramercy plant since 1958 is plainly erroneous. Accordingly, the seniority rosters prior to 1969 are fatally tainted by that discrimination. The courts have routinely adjusted seniority rosters to determine access to a job benefit, where such taint has been found. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975); *Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678 (5th Cir. 1975); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Local 189, United Papermakers and Paperworkers*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

Given all these facts and given the uncontested underutilization of women and blacks in Gramercy's craft positions, the employer and the union had every reason to voluntarily negotiate the affirmative action plan here at issue without the interposition of any judicial determination and without the formal admission of past discrimination. The plan fairly and reasonably remedied uncontested underutilization of women and blacks in the Gramercy plant crafts with the least possible adverse impact upon competing white males. The purpose and the effect of the plan was:

> "[T]o assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1972).

To invalidate such a plan is to guarantee that the status quo will be indefinitely frozen. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). Title VII not only does not prohibit, but requires the adoption of such a plan.

CONCLUSION

Wherefore the Women's Caucus of District 31 of the USWA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed, that the permanent injunction entered by the District Court be dissolved, and that the USWA-Kaiser collective bargaining agreement be found to be consistent with Title VII of the Civil Rights Act of 1964

Respectfully submitted,

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APPENDIX

An Overview of Women in the Workforce

42%—42.1 million—of the U.S. work force are Women. In 1977, 56% of Women 16 and over worked all or part of the year.

During the last decade the labor force expanded beyond government estimates. A key factor for this expansion has been the large influx of women workers. The number of women holding jobs has grown from 18 million in 1950 to 42.1 million in July 1978, a 129% increase. The total work force has grown from 62.2 million in 1950 to 100.6 million in July 1978, a 61.7% increase.

The overall pattern of growth does not focus, however, on movements within the different segments of women in the labor force. Participation rates vary considerably among women of different ages, family and marital status, race, and educational levels as outlined below.

Of the Women in the Workforce in March 1978, Nearly 80% were in Clerical, Sales, Service, Factory or Plant Jobs

According to the seasonally adjusted data released in March 1978, women workers were divided into the following occupational categories:

Professional-technical	16.1%
Managerial-Administrative	6.3%
Sales	6.8%
Clerical	34.7%
Craft	1.7%
Operative	11.2%
Non-Farm laborer	1.6%
Service, including private household	20.5%
Farm laborer	1.1%

These data do not show the concentration of men and women into certain job titles. For example, in professional jobs 60% of the women are non-college teachers or nurses, while men tend to be lawyers, doctors, or college professors. Within each occupational category the wages between men and women vary considerably. For every dollar earned by a man, a woman in the same job category earns significantly less. As of May 1977, the wage gap was:

	Women	Men
Sales	$.45	$1.00
Clerical	$.64	$1.00
Service	$.65	$1.00
Manufacturing	$.59	$1.00

In 1977 Full-Time Women Workers Had a Median Income* of $6,256 Less Than Men

Women working full-time, year round in 1977 had a median income of $8,814, while men's income averaged $15,070. Women made 58.5¢ to every dollar made by men. In 1955, women's median income was $2,734 to men's $4,246 (64.3¢ to the dollar made by men.)

Women of Spanish origin had the lowest income of any racial/ethnic group. Their income was less than half of white male's. In 1977, the medium annual income for men and women by race was:

		Percent of White Males
White Males	$15,378	100%
Spanish Origin Males	$10,935	71.1%
Black Males	$10,602	68.8%
White Females	$ 8,870	57.6%
Black Females	$ 8,290	53.9%
Spanish Origin Females	$ 7,599	49.4%

**Income includes earnings plus social security, investments, etc.*

On an Average, Women Who Work Full-Time Earn 59 Cents for Every $1 Earned by Men

During the last 25 years, women's earnings as a percent of men's have dropped steadily. In 1955, full time women workers earned 64¢ to men's one dollar. By 1960 this figure had dropped to 61¢. Ten years later in 1970, women's earnings were calculated to be 59.4¢ per men's one dollar. 1977 census data show that the median annual earnings for full time male workers was $14,626 and for female workers was $8,618 or 58.9%.

In 1976, About One in Every Ten Working Women Belonged to a Union

Of the 38 million women workers in 1976, 11.3% belonged to a *labor union*, down from 12.6% of women workers in 1970. Between 1970-76, the number of unionized working women increased from 4 to 4.3 million, a 7.5% increase. The total number of union members increased from 19.2 to 19.5 million,

a 1.5% increase. Women were 20.7% of all union members in 1976.

15.9% of all working women belonged to *unions and associations* in 1976. Women members increased from 5 to 6.1 million, a 22% increase; while overall membership increased from 21.1 to 22.8 million, a 33% increase, between 1970-1976.

The following percentage of all women in these occupations were union members in 1975:

34.1% of blue collar workers, including craft, operatives and non-farm laborers
11.5% of clerical workers
11.1% of service and private household workers.
6.2% of sales workers

For further information see August 1978 *Monthly Labor Review*, "Women in Labor Organizations: Their Ranks are Increasing," Bureau of Labor Statistics, U.S. Department of Labor.

Nearly 7 Out of Every 10 Women Born Between 1954-1958 are Now in the Work Force

In July 1978, 69% of women between 20 and 24 years of age, and 62% of women between 24 and 34 years of age, were working or looking for work. These figures have increased from 46% and 36%, respectively, in 1960. The only age group in which fewer than one-half of women currently work for pay is that group of 55 and over.

PERCENTAGE OF WOMEN IN U.S. LABOR FORCE

	Annual Averages			July 1978 Seasonally Adjusted
	1960	1970	1977	
18 and 19 years	50.9	53.6	60.5	62.4
20 to 24 years	46.1	57.7	66.5	69.1
25 to 54 years, total	42.9	50.1	58.4	60.5
25 to 34 years	36.0	45.0	59.5	62.6
35 to 44 years	43.4	51.1	59.6	61.5
45 to 54 years	49.8	54.4	55.8	57.3
55 to 64 years	37.2	43.0	41.0	40.9
65 years and over	10.8	9.7	8.1	8.5

The Number of Married Women in the Work Force is Over 5 Times as Large as in 1940

The change in distribution of married women workers (husband present) has been the most dramatic of all categories of female jobholders. In 1940, these married women comprised only 30%, or 4.2 million, of all women workers. In March, 1978, 55.6% nearly 23 million, of all female workers were married with husbands present.

Since 1970 the number of divorced women workers has doubled—the number rose from 1.9 million in 1970 to 3.9 million in March 1978. The number of never married single women jobholders increased from 7 million in 1970 to 10.2 million in 1978.

Overall, of the 42 million working women in the United States, 25% are single, 56% are married, 4% are separated, 5.5% are widowed and 9.5% are divorced.

The highest participation rate (74%) of any group of women classified by marital status are those who are divorced. In March, 1978, percentages of women jobholers 16 years or older in the various groups were never married—60.5%; married, husband absent—56.8%; husband present—47.6%; and widowed—22.4%.

More Than Half of All Husband-Wife Families in 1978 Had Two or More Wage Earners

In March 1978 there were 57.2 million families in the United States. Of these 47.4 million had both husband and wife present, representing 83% of all families. In nearly 6 out of 10 of all husband-wife families, both partners held paid jobs.

Female-headed families accounted for 8.2 million, or 14.4% of all American families, while male-only headed families totaled 1.6 million.

At the top of the family income scale are those with two or more earners—the husband and second family member other than the wife, though she is present. The median income for these families in 1977 was $23,945. At the bottom of the family income scale, excluding those without earners, are single-earner families headed by women. These families have a medium income of $7,977 per year.

Average American family incomes for 1977 were:

Total, all families	$16,146
one earner	13,218
two earners or more	20,415
Husband-wife families, total	17,720
Total, families headed by women	7,765
Total, families headed by men	14,538

The National Commision on Working Women is a nongovernmental, action-oriented body. It was created to focus on the needs and concerns of that approximate 80% of women in the workforce who are concentrated in lower-paying, lower-status jobs in service industries, clerical occupations, retail stores, factories and plants.

Commission members are women and men representing business, labor, the Congress, the media, academia and working women themselves. As its secretariat, the Center for Women and Work implements the Commission's programs, seeks to achieve its overall goals, and serves as a national exchange for ideas, information and research related to the world of women in the workforce. The center it a separate operational unit within the National Manpower Institute, a private, nonprofit organization dedicated to "the fullest and best use of the human potential." Major funding is through a grant from the National Institute of Education (Department of HEW), with special project funds from the Ford Foundation and the Rockefeller Family Fund, and private corporations. Sources for statistics are: U.S. Departments of Labor and Commerce, September 1978.

Supreme Court, U.S.
FILED
FEB 24 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435 and 78-436

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF THE CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION

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AMICUS CURIAE BRIEF ON BEHALF OF THE CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION

I

INTEREST OF THE AMICUS CURIAE

California Correctional Officers Association (hereinafter "CCOA") has been granted permission to file an Amicus Curiae brief by counsel for all of the parties herein. The original letters expressing consent, or lack of objection to the filing of this Amicus Curiae Brief, have been transmitted with the brief for filing with the Court. CCOA is an organization of some Four Thousand (4000) correctional officers employed by the State of California.

CCOA, on behalf of itself and its members, filed an action entitled *Minnick, et al. v. California Department of Corrections* (Case No. 700-048) in the Superior Court of the State of California in and for the City and County of San Francisco alleging that the California Department of Corrections and the State of California have been illegally granting preferences in hiring and promotion on the basis of race. CCOA prevailed in that action, and is currently defending an appeal by the defendants in the Court of Appeal in the State of California, First Appellate District (Case No. 42545). An issue raised therein, as it is in the instant action, is the propriety of instituting a voluntary affirmative action program which grants preferences on the basis of race. CCOA has filed an Amicus Curiae brief in this action as it is inevitable that any decision herein will affect its interest in the action pending in the California Courts.

II

ARGUMENT

The Amicus Curiae supports the respondent, Weber, in the instant action, but does not wish to engage in lengthy argument on the issues already raised herein. The Amicus Curiae merely wishes to present an argument which has not yet, to our knowledge, been presented to this Court. The Amicus Curiae contends that in the provisions of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., Congress explicitly contemplated those situations in which it would be legally permissible to grant preferences.

Congress provided in § 703(i), 42 U.S.C. § 2000 e-2 (i), as follows:

> "Nothing contained in this Title [42 U.S.C. § 2000(e) et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a *preferential treatment is given to any individual because he is an Indian living on or near a reservation.*" [Emphasis added].

This much ignored section immediately proceeds § 703(j) which provides that preferential treatment should not be required on account of numerical or percentage imbalances. 42 U.S.C. § 2000 e-2 (j). Not only did Congress expressly limit the preferential treatment allowed to that given by employers "on or near an Indian reservation," but limited that preference only to Indians *"living on or near a reservation."* When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929). The Court of Appeals in the Seventh Circuit has stated that the Courts are barred from additions

to a prescribed list by the maxim *expressio unio est exclusio alterius*, and the Court does not have the authority to extend the statutory catalog of invalidating conditions. *Hawkeye Chemical Co. v. St. Paul Fire & Marine Insurance Company*, 510 F.2d 322, 327, (7th Cir. 1975) cert. denied 421 U.S. 965 (1975). Thus, under Title VII, not only is preferential treatment limited to Indians, but Congress limited preference to Indians living on or near a reservation. Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. *J. Ray McDermott & Company, Inc. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972) cert. denied, *Fish Meal Company v. J. Ray McDermott & Co., Inc.* 409 U.S. 948 (1972); *City of Burbank v. General Electric Company*, 329 F.2d 825, 832 (1964); *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 514-515 (1963).

Although there is probably no group in the history of the United States that has been more maligned, abused and discriminated against than Indians, this Court has not found that prior discrimination justifies preferential treatment in employment for Indians. In *Morton v. Mancari*, 417 U.S. 535 (1974), it was the unanimous view of the Court, as expressed by Justice Blackmun, that § 12 of the Indian Reorganization Act of 1934, 25 U.S.C.S. § 472, which grants to Indians an employment preference in the Bureau of Indian Affairs, was not in violation of the Equal Employment Opportunity Act of 1972 (5 U.S.C. §§ 5108, 5314, 5315, 5316; 42 U.S.C.S. §§ 2000e, 2000e-1, 2000e-6, 2000e-8, 2000e-9, 2000e-13, 2000e-17), nor was it in violation of the due process clause of the Fifth Amendment. The Court held

that the preference did not constitute racial discrimination, nor indeed even a racial preference, but was rather a criterion "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Morton v. Mancari*, 417 U.S. 535, 554. Justice Blackmun indicated that it would be improper to grant a preference based upon race rather than one based upon recognition of the special legal position of Indians:

> "The exemptions reveal a clear Congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment *did not constitute racial discrimination of the type otherwise proscribed*." Id. 417 U.S. 535, 548.

In a more recent decision, Chief Justice Burger expressing the unanimous view of the Court, wrote the following, referring frequently to the *Morton* decision:

> "The decisions of this Court leave no doubt that Federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon *impermissible racial classifications*." [Emphasis added] *United States v. Antelope*, 430 U.S. 641, 645 (1977).

Never has it been shown that Congress intended in passing Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., to permit employers to conclude that they had discriminated and to consequently grant preferences in employment to some races to the disadvantage of others. Congress specifically authorized the granting of preferences to Indians living on or near reservations, but otherwise authorized only the Courts to grant preferences and only then *after* a finding by the Courts that the employer had engaged in an unlawful employment practice:

> "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice or other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay • • • or any other equitable relief as the Court deems appropriate . . ." § 706(g) of Title VII, Pub. L. 88-352, 78 Stat. 261, as amended, 42 U.S.C. 2000 e-5(g).

Certainly, there is nothing in Title VII which prohibits employers from affirmatively taking steps to eradicate discriminatory selection devices. However, Congress narrowly limited the circumstances in which the rights and expectations of innocent third parties could be impaired by the granting of preferences. One might think that Justice Blackmun had the instant case in mind when he cited to the House report in his opinion in *Morton v. Mancari:*

> " 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should be not treated similarly . . .' HR rep. No. 92-238, on HR 1746, pgs. 24-25 (1971)." 417 U.S. 435, 547.

III

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted

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MOTION FILED
FEB 23 1979

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Consent to the filing of the brief has been given by all parties except counsel for the United States.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 30,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interest of individuals, such as Brian Weber, whose special problems deserve exceptional attention and protection by states and the Federal Government.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is focusing upon the general legality of voluntary affirmative action programs requiring racial quotas in employment. WLF's sole concern in this case is to uphold the rights of individuals, as well as the integrity of seniority systems, against unlawful reverse discrimination.

What the Supreme Court will decide in this case will have sweeping ramifications which go far beyond the fate of one training program in Gramercy, Louisiana.

The *Weber* decision will effect the employment prospects of countless millions of American workers as well as their relationships with labor unions, employers and the Federal Government. Fundamental concepts of equality may well be at stake in this case. WLF seeks to protect the interests of Brian Weber as a means to defending the right of any individual to obtain employment without regard to his race, sex or national origin. Seniority systems, long a strategic component in labor relations, should not be bypassed except for the most profound and compelling reasons.

Accordingly, Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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What the Supreme Court will decide in this case will have sweeping ramifications which go far beyond the fate of one training program in Gramercy, Louisiana. The *Weber* decision will effect the employment prospects of countless millions of American workers as well as their relationships with labor unions, employers and the Federal Government. Fundamental concepts of equality may well be at stake in this case. WLF seeks to protect the interests of Brian Weber as a means to defending the right of any individual to obtain employment without regard to his race, sex or national origin. Seniority systems, long a strategic component in labor relations, should not be bypassed except for the most profound and compelling reasons.

ARGUMENT

I. AFFIRMATIVE ACTION HIRING PLANS INVOLVING THE USE OF RACIAL QUOTAS ARE ILLEGAL EXCEPT AS A REMEDY FOR PRIOR RACIAL DISCRIMINATION IN EMPLOYMENT WHICH IS NOT PRESENT IN THIS CASE.

Discrimination towards racial or ethnic groups has been one of the more tragic themes of American history. Racism and other forms of bigotry have long been entrenched in such areas as education, housing and employment. To combat these evils, the Federal Government has employed various judicial, legislative and regulatory remedies. The United States Constitution's Fifth and Fourteenth Amendments, the Civil Rights Act of 1964,[1] Executive Order No. 11246[2] and other statutes and regulations provide administrative and judicial remedies for eliminating racial discrimination.

Racial discrimination in employment is prohibited by Title VII of the 1964 Civil Rights Act.[3] In addition, federal courts are given the authority to mandate affirmative action on the part of violating parties to remove the results of discriminatory employment practices.[4] The courts have ample equitable power to fashion proper solutions to discriminatory problems.[5]

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[1] 42 U.S.C. § 2000a et seq. (1970).

[2] 3 C.F.R. § 339, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967) and 43 Fed. Reg. 46501 (1978).

[3] § 703(a) of the act, 42 U.S.C. § 2000e-2(a) (1970).

[4] § 706(f) and (g), 42 U.S.C. §§ 2000e-5(f) and (g) (1970).

[5] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

A. Racial Quotas Should Not Be Used Except As a Last Resort for Prior Racial Discrimination in Employment.

In devising affirmative action remedies to employment discrimination, federal courts have not hesitated to modify or jettison existing seniority systems. The most controversial method, and the one most pertinent to *Weber,* is the use of a racial quota.

Quotas, ratios, or goals are designed to insure a certain desired representation of minority or other groups in various aspects of employment, such as hiring, training programs (as in *Weber*), and promotions. At an initial glance, the use of a racial quota as a remedy for racial discrimination would seem to violate Sections 703(a) or 703(d) [6], and 703(j) [7] of the 1964 Civil Rights Act. Section 703(a) contains a general prohibition against discrimination by an employer towards individuals when hiring, on the job and firing. Section 703 (d), applicable in this case, forbids discrimination against individuals by parties who operate employment training programs. Section 703(j) stresses that employers, labor unions and other affected parties, in fulfilling their obligations under Title VII are not compelled to "grant preferential treatment to any individual or to any group" due to the fact that the percentage of minorities, employed in a training program does not equal their percentage of the local or state population.

Quotas in the form of judicially ordered affirmative programs do not necessarily violate the above provisions.[8] The United States Supreme Court has noted that

[6] 42 U.S.C. § 2000e-2(d) (1970).

[7] 42 U.S.C. § 2000e-2(j) (1970).

[8] *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 767 (E.D. La. 1976).

federal courts under Title VII have the authority to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [9] Some time later, the Court found, in a school desegregation case, that "mathematical ratios" made a "useful starting point in shaping a remedy to correct past unconstitutional violations." [10]

Lower federal courts have, during the 1970's, used such ratios or quotas for remedial purposes involving employment discrimination.[11] It has been considered necessary that, "temporary, short-range preferences for minorities may be mandated by the duty to eradicate the continuing effects of past discrimination." [12]

Courts have not, however, ordered quotas lightly. In the Seventh Circuit, "[p]referential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of

[9] *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770 (1976).

[10] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

[11] *See, e.g., Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972), *S. Ill. Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972), *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974), *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), *EEOC* v. *Local 638*, 532 F.2d 821 (2d Cir. 1976), *United States* v. *Int'l Union of Elevator Constructors Local 5*, 538 F.2d 1012 (3d Cir. 1976) and *Davis* v. *County of L.A.*, 566 F.2d 1334 (9th Cir.), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3780 (June 19, 1978) (No. 77-1553).

[12] *German* v. *Kipp*, 429 F.Supp. 1323, 1333 (W.D. Mo. 1977).

each case." [13] The Fifth Circuit has considered quotas a "drastic remedy" to be utilized as a last resort.[14]

In *Kirkland* v. *New York State Dept. of Correctional Services* [15], Second Circuit Judge Van Graafeiland noted:

> The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.
>
> The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the 'discrimination inherent in a quota system.'
>
> Our court has approached the use of quotas in a limited and 'gingerly' fashion. [footnotes omitted] [16]

That circuit requires the fulfillment of two prerequisites before quotas are ordered: there must be a past history of discrimination and there must not be adverse effects upon "a relatively small, identifiable group of reverse discriminatees." [17]

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[13] *United States* v. *City of Chicago*, 549 F.2d 415, 437 (7th Cir. 1977).

[14] *NAACP* v. *Allen*, 493 F.2d at 621.

[15] 520 F.2d 420 (2d Cir. 1975).

[16] *Id.*, at 427.

[17] *EEOC* v. *Local 638*, 532 F.2d at 830.

The First Circuit has stated:

> Even where a long history of discrimination and continuing racial imbalance compels the remedial use of racial criteria, however, the means chosen to implement the compelling interest should be reasonably related to the desired end.[18]

The caution of federal courts in applying racial quotas has resulted in several decisions not finding the proper conditions for this "drastic remedy." [19]

Justice Powell in his opinion in the *Bakke* case summarized the actions of the lower courts:

> The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference . . . . Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination . . . . But we have never approved preferential classifications in the absence of proven constitutional or statutory violations.[20]

Another issue concerning quota systems involves the ability of an employer to voluntarily set up a remedial quota plan, even if past racial discrimination has been

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[18] *Associated Gen. Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9, 18 (1st Cir.), *cert. denied*, 416 U.S. 957 (1974).

[19] *Watkins* v. *United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975), *Chance* v. *Bd. of Examiners & Bd. of Educ.*, 534 F.2d 993 (2d Cir.), *cert. denied*, 431 U.S. 965 (1977), *Patterson* v. *Am. Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).

[20] *Regents of the Univ. of Cal.* v. *Bakke*, —— U.S. ——, 98 S.Ct. 2733, 2754-55 (1978).

present. Two lower federal courts have held that voluntary employer plans would violate Section 703(a) of Title VII as unlawful discrimination. Courts, however, are unaffected by restrictions in Section 703(a). The equitable powers of courts to fashion quota plans which are permitted by Section 706(g) do not, therefore, extend to employers.[21] If this reasoning is correct, then petitioners' voluntary affirmative action plan is a violation of Title VII.

Amicus cannot emphasize enough that affirmative action measures such as applying racial quotas in employment must be a reaction to *proven* past discrimination by an employer or labor union. If a collective bargaining agreement contains a racial quota, although there is no proven history of previous racial discrimination, then the quota would have passed beyond the limits of affirmative relief into the unlawful territory of reverse discrimination. The decision of the Court of Appeals in *Weber,* in striking down petitioners' quota plan, should therefore be upheld as a logical extension of previous case law.

B. Societal Discrimination Alone Is a Vague and Improper Standard to Require Imposition of Racial Quotas and Should Not Be Applied to This Case.

Petitioners argued in the Court of Appeals that the on-the-job training quota agreed upon by Kaiser Aluminum and the United Steelworkers was not in response to specific racial discrimination at the Kaiser plant in Gramercy. The training program ratio was

[21] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 415 F. Supp. at 767-68. The Fifth Circuit commented upon this concept in *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 563 F.2d 216 (5th Cir.), *pet. for rehearing denied,* 571 F.2d 333 (1978) but did not employ it in its decision.

designed to combat general societal discrimination by employing more black craft workers.[22]

The use of vaguely defined societal discrimination as a rationale for imposing racial quotas would approve "virtually any affirmative action program, irrespective of whether a particular employer had itself discriminated in the past."[23] A societal discrimination approach would be sweeping in scale and over-extensive in application to specific problems. It is indeed, "an amorphous concept of injury that may be ageless in its reach into the past."[24]

Courts have generally been hostile to this notion, preferring to examine the activities of only the employers concerned with discrimination litigation.[25] Chief Jus-

[22] *Weber* v. *Kaiser Aluminum & Chemical Corp.,* 563 F.2d at 224-25.

[23] Moeller, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination,* 43 Mo. L. Rev. 451, 499 (1978).

[24] *Regents of the Univ. of Cal.* v. *Bakke,* 98 S. Ct. at 2757.

[25] A partial list would include *Chance* v. *Bd. of Examiners,* 534 F.2d 993 (2d Cir.), *cert. denied,* 431 U.S. 965 (1977), *Patterson* v. *American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976), *Watkins* v. *United Steelworkers,* 516 F.2d 41 (5th Cir. 1975), and *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978). Societal discrimination was a concern to the court in *Germann* v. *Kipp.* However, the court in that case was not sanctioning a rigid racial quota, but more flexible "goals," 429 F. Supp. at 1339, which are not pertinent to the facts of *Weber.* Even if statistics are employed to make a case of a pattern of employment discrimination against blacks in craft trades generally as compared to their population proportion in the United States, this does not show the necessary discrimination at the Gramercy plant. For a discussion on the use of statistics *see Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977) and *Hazelwood School Dist.* v. *United States,* 433 U.S. 299 1977).

tice Burger remarked in *Griggs* v. *Duke Power Co.*:

> In short, the Act [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[26]

The Eighth Circuit has rejected the Pandora's Box of societal discrimination. That court, in a reverse discrimination case, stated:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.[27]

Circuit Judge Gee in *Weber* reacted to the societal discrimination claim in this manner:

> . . . unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title VII.[28]

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[26] 401 U.S. 424, 430-31 (1971).

[27] *Carter* v. *Gallagher*, 452 F.2d at 325. In the context of this case, Brian Weber's superior qualification is due to his higher seniority ranking than the chosen black workers in the training program.

[28] *Weber* v. *Kaiser Aluminum & Chem. Corp.*, 563 F.2d at 225.

The court found that societal discrimination was irrelevant to an examination of seniority at the Kaiser Gramercy plant. The plant, since its opening in 1958, did not have a history of racial discrimination in either hiring or in the seniority system. On that basis, i.e. on the plant level, the training quota, having "no foundation in restorative justice" acted as unlawful racial discrimination.[29]

An authoritative rebuke of societal discrimination was enunciated in *Bakke*. Justice Powell opined:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. [footnote omitted] [30]

The standard advocated in *Weber* of only employing affirmative action relief on the plant level is supported by several Supreme Court cases involving "make-whole" remedies to discriminated individuals.[31] These remedies, such as back pay, and seniority are designed to assist individuals in compensating them for detri-

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[29] *Id.*, at 225-26. The findings in *Weber* are thereby isolated from discrimination suits against Kaiser in other plants. *See Parson* v. *Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978).

[30] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2757-58.

[31] *Int'l Bhd. of Teamsters* v. *United States*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Albemarle Paper Co.* v. *Moody*.

mental effects of proven racial discrimination in employment. This has been called the "rightful place" doctrine.[32] No mention is made there of remedies for societal harms to individuals.

Amicus finds that the argument of the petitioners concerning the use of societal discrimination has little support in the law. If employees are discriminated against, then this evil must occur on the plant level. The Kaiser Gramercy plant has not been a scene of employer or union discrimination in the past. Consequently, the Kaiser-United Steelworkers training agreement is demonstrated to be a discriminatory pact against innocent individuals like Brian Weber.

II. COLLECTIVE BARGAINING AGREEMENTS WHICH EMPLOY NON-REMEDIAL RACIAL QUOTAS VIOLATE THE CIVIL RGHTS ACT OF 1964 AND SHOULD BE SET ASIDE.

In the first section it was noted that the proper use of any affirmative action plan featuring racial quotas could be utilized only as a remedy for prior racial employment discrimination. The proper locus for testing discrimination under Title VII would be the plant site of a company.

Amicus suggests that, under the given factual circumstances in *Weber,* a strong case for the presence of unlawful reverse racial discrimination can be made.

A. Non-remedial Racial Quotas Constitute Unlawful Reverse Discrimination.

As long as an affirmative action plan acts as a remedy for prior racial discrimination, it will usually be upheld. However, a plan not designed as a response to previous discrimination does not constitute a remedy

[32] *Weber* v. *Kaiser Aluminum & Chem. Corp.*, 563 F.2d at 220.

pertinent to Title VII. In fact, "the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress." [33]

Seniority systems have become routine subjects of collective bargaining between employers and unions. Problems involving seniority have bred a swarm of litigation over the years.

It has been determined that neither a union nor an employer may engage in bargaining to obtain illegal discriminatory provisions in contracts.[34] The Seventh Circuit has declared that "Title VII mandates that workers of every race be treated equally according to their earned seniority." [35]

The above statements suggest that seniority systems, which promote job security and form an objective standard for promotions, layoffs and the like, should not be modified except for the most compelling of reasons, e.g., the presence of racial discrimination. The authors of the Kaiser-United Steelworkers quota plan, regardless of the benevolence of their motives, have adversely impacted the seniority rights of Brian Weber and the class of workers he represents by allowing workers with less seniority to enter the training program before him.

Courts have found that discrimination, whether reverse or not, profoundly affects personal rights guaranteed by the Fourteenth Amendment [36] and by Title

[33] *Chance* v. *Bd. of Examiners & Bd. of Educ.*, 534 F.2d at 998.

[34] *Emporium Cazwell Co.* v. *W. Addition Community Organization*, 420 U.S. 50 (1975).

[35] *Waters* v. *Wis. Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1319 (7th Cir. 1974).

[36] *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

VII.[37] Justice Douglas, in his dissenting opinion in *DeFunis* v. *Odegaard,* observed that, "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[38]

Title VII cases were originally brought by blacks and other minority groups. Subsequently, whites initiated suits to vindicate their own constitutional and statutory rights in employment, education, etc. Such efforts were sanctioned by the Supreme Court in *McDonald* v. *Santa Fe Trail Transportation Co.*[39] The Court indicated that white plaintiffs could use the antidiscrimination provisions of Title VII in the same manner as blacks could.[40]

White litigants have challenged with mixed results preferential treatment by race or sex in such areas as law [41] and medical school [42] admissions, civil service eligibility lists,[43] minority union member quotas,[44] em-

[37] *Furnco Constr. Corp.* v. *Waters,* —— U.S. ——, 98 S. Ct. 2943, 2951, *City of L.A., Dep't of Water* v. *Manhart,* —— U.S. ——, 98 S. Ct. 1370, 1375, *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 71-72 (1977).

[38] *DeFunis* v. *Odegaard,* 416 U.S. 312, 342 (dissenting opinion) (Douglas, J.) (1974).

[39] 427 U.S. 273 (1976).

[40] *Id.,* at 280.

[41] *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

[42] *Regents of U. of Cal.* v. *Bakke,* —— U.S. ——, 98 S. Ct. 2733 (1978), *Alevy* v. *Downstate Medical Center,* 39 N.Y.2d 326, 384 N.Y.S.2d 82, 348 N.E.2d 537 (1976).

[43] *Kirkland* v. *N.Y. State Dep't of Correctional Services,* 520 F.2d 420 (2d Cir. 1975).

[44] *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976).

ployment hiring,[45] training programs,[46] promotion,[47] layoffs [48] and firing.[49]

For example, the affirmative action promotion program in *Brunetti* was overturned because, "the rights of non-minority employees may not be violated in the absence of a purpose to compensate minority employees from the effects of past discrimination."[50] In addition, in a reverse sex discrimination suit, an employer who complied with a quota authorized by a consent decree would still be liable for damages to those he discriminated against.[51] On the other hand, the plaintiff in *Alevy* lost his battle against a racial preference at a New York medical school. The court found that Alevy's grades would not insure him admission even without a racial preference to contend with. Preferential treatment was upheld if its extent and duration were "temporary and limited."[52]

Of significant importance in many reverse discrimination cases is the problem of deciding which equal

[45] *Cramer* v. *Va. Commonwealth Univ.,* 586 F.2d 297 (4th Cir. 1978).

[46] *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 415 F.Supp. 761 (E.D. La. 1976), 563 F.2d 216 (5th Cir.), *pet. for rehearing denied,* 571 F.2d 333 (1978).

[47] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *Germann* v. *Kipp, Brunetti* v. *City of Berkeley,* 12 FEP Cas. 937 (N.D. Cal. 1975).

[48] *Watkins* v. *United Steelworkers of America Local 2369, Anderson* v. *San Francisco Unified School Dist.,* 357 F. Supp. 248 (N.D. Cal. 1972).

[49] *Chance* v. *Bd. of Examiners & Bd. of Educ.,* 534 F.2d 993 (2d Cir.), *cert. denied,* 431 U.S. 965 (1977).

[50] *Brunetti* v. *City of Berkeley,* 12 FEP Cas. at 939-41.

[51] *McAleer* v. *AT&T Co.,* 416 F. Supp. 435 (D.D.C. 1976).

[52] *Alevy* v. *Downstate Medical Center,* 39 N.Y.2d at 337-8, 384 N.Y.S.2d at 91-92, 348 N.E.2d at 546-47.

protection standard is required in reviewing the constitutionality of affirmative action programs. Prior to the *Bakke* decision, there had been doubts as to whether a rational basis test (the traditional view of assuming the constitutionality of a particular classification) or the compelling state interest test (involving a strict judicial scrutiny of an action effecting a suspect classification or a fundamental personal interest) was applicable for reverse discrimination cases.[53]

With *Bakke,* the equal protection question for reverse discrimination was answered decisively. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[54] Justice Powell continued, "[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[55]

Amicus believes that using a strict scrutiny test to reverse discrimination cases will properly result in the invalidation of preferential devices such as quotas, especially if no prior history of racial discrimination is involved, as in *Weber*. Since the Second World War, the Supreme Court, using the strict scrutiny standard, has never approved racial classifications except as to remedy previous unlawful racial discrimination.[56] In

[53] *See generally,* Kettelkamp, *Reverse Discrimination,* 45 MISS. L. J. 467 (1974); Elliot, *Reverse Discrimination: The Balancing of Human Rights,* 12 WAKE FOREST L. REV. 852 (1976); Renfrew, *Affirmative Action: A Plea for a Rectification Principle,* 9 S.W.U.L. REV. 597 (1977).

[54] *Regents of the Univ. of Cal.* v. *Bakke,* 98 S. Ct. at 2749.

[55] *Id.,* 98 S. Ct. at 2751.

[56] Renfrew, *supra* note 21, at 605.

cases where state action is involved, the imposition of preferential racial quotas will violate the Fourteenth Amendment's Equal Protection clause.

Although there are ample legal grounds to strike down discriminatory racial quotas, there are also valid policy arguments against a policy of racial preferences such as quotas.[57] One factor lies in the nature of quotas themselves. As a federal court so cogently explained:

> The evil of the . . . quota system lies in its effect, not in its "affirmative action" name. While the purpose of a quota system is generally compassionate, its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic—skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate.[58]

[57] *See generally,* N. Glazer, *Affirmative Discrimination,* (1st ed. (1975), *Social Justice & Preferential Treatment* (1st ed. W. Blackstone and K. Heslep ed. 1977), *Reverse Discrimination* (1st ed. B. Gross ed. 1977), B. Gross, *Discrimination in Reverse: Is Turnabout Fair Play?* (1st ed. 1978), J. Feagin, *Discrimination American Style,* (1st ed. 1978), Sher, *Justifying Reverse Discrimination in Employment,* 4 PHILOSOPHY & PUB. AFFAIRS 159 (1975), Lieb, *Affirmative Action: A Delicate Balance in Employment & Education,* 5 HOFSTRA L. REV. 581 (1977), Reed, *The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance,* 8 LOYOLA U.L.J. 369 (1977), Buckley, *Reverse Discrimination,* 16 WASHBURN L. J. 421 (1977), Fagan and Damelio, Jr., *Preferential Admissions and the Constitutional Course of Bakke,* 5 OHIO N.U. L.R. 444 (1978).

[58] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. at 1014-15 (E.D.Mich. 1978).

Another defect of preferential treatment is its simplistic and patronizing view that being a member of a minority means that one should automatically receive some form of compensation. By fashioning relief in terms of racial or ethnic groups, courts run the danger of being both under and over-inclusive. There are wealthy and educated blacks and poor ignorant whites. Yet, an affirmative action program tied to race would assist the former and ignore the latter. Programs must be fashioned not to aid an individual because of his skin color but because, regardless of his race, he is in fact economically disadvantaged.

The *Bakke* court questioned assumptions as to the nature of the racial majority:

> As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not.[59]

Preferential treatment offends our basic concept of equality. *Every* individual is entitled to the *same* equal protection under the law. However, preferential quotas by their nature tend to benefit certain groups, regardless of individual need.

When one group is benefited, often others are detrimentally affected. If a quota prevents significant num-

[59] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2751.

bers of "majority" workers from entering an on-the-job training program, racial divisiveness and societal unrest can only result. The resentments of one group are directly linked to the opportunities given another. Pressures might indeed develop for individuals of the same ethnic or racial group, in order to obtain economic advancement, to form lobbying organizations or even political parties. The negative results of sustained ethno-centric politics upon American democracy are readily foreseeable. There are enough social, economic and political divisions existing in the United States today without the prospect of group rivalries tearing at the fabric of our society.

Reverse discrimination is also pernicious because it acts to stigmatize the same persons they are intended to serve. In *Detroit Police Officers Association,* it was stressed that:

> "[t]o sanctify the department's quota would be to judicially insult the black police officers of the department. In effect the Court would be telling them that a quota is needed in order for them to obtain a promotion.[60]

Along with connotations of inferiority created by the presence of quotas, blacks and other minorities face the difficulty of a loss in incentives to improve their own economic condition. If individuals, without any effort, obtain benefits solely due to their race, then there is no need to develop one's skills to the highest degree. An unhealthy dependency upon preferential systems is a distinct possibility.

A final flaw with the rationale of preferential relief is that, in order to achieve the requirements of quotas,

[60] *Detroit Police Officers Ass'n* v. *Young*, 446 F. Supp. at 1015.

overall standards in achievement may suffer. In the long run, it is not the race of an attorney or doctor that matters, but his effectiveness and skill. It is far more desirable to have individuals selected on the basis of merit rather than their race. A quota system acts to "reward mediocrity and penalize excellence, thereby offending principles of merit and equal opportunity."[61]

Amicus feels that both legal principles and policy considerations lead to the conclusion that non-remedial racial quotas, such as the training program at the Kaiser Gramercy plant, constitute reverse discrimination in clear violation of Title VII.

B. The Prohibition Against Racial Discrimination in the Civil Rights Act of 1964 Must Be Accorded Priority Over the Affirmative Action Goals of Executive Order No. 11246.

Each branch of the Federal Government has developed a form of affirmative action remedy to deal with racial discrimination.

Executive Order No. 11246, promulgated by President Johnson in 1965 and amended since then, is the cornerstone of the presidential anti-discrimination structure. The Order requires effected government contractors, subcontractors and employers to maintain affirmative action programs. The Office of Federal Contract Compliance has promulgated affirmative action guidelines for most companies doing business with the government.[62] The guidelines mandate the use of goals and timetables to eliminate minority under-representa-

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[61] Buckley, *supra* note 25, at 426.

[62] OFCCP Affirmative Action Guidelines (Revised Order No. 4), 41 C.F.R. §§ 60-2.1 to 60-2.32. The construction industry was effected by 41 C.F.R. 8860-1.1 to 60-1.47.

tion. The government may cancel or suspend the contracts of guideline violators or bar them from trying to secure future government contracts.[63] At the same time that they develop goals, government contractors must avoid quotas for reverse discrimination.[64]

Litigation has developed concerning the validity of these executive regulations, especially when compared to the restrictions against discrimination found in Title VII.

A reverse discrimination suit against a government-ordered construction hiring percentage was rejected in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*.[65] Executive Order No. 11,246's affirmative relief was not affected by Section 703(j). The prohibition on preferential treatment could only apply to Title VII actions.[66]

Other federal courts upheld the preference powers found in the executive regulations.[67] Nevertheless it is of significance that all of those cases "emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy."[68]

The Fifth Circuit in *Weber* faced the situation where an employer had made a voluntary affirmative

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[63] Rose, *Reverse Discrimination Developments Under Title VII*, 15 Houston L. Rev. 136, 145 (1977).

[64] 41 C.F.R. § 60-2.30.

[65] 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[66] *Id.*, 442 F.2d at 172.

[67] e.g. *Germann* v. *Kipp, Associated Gen. Contractors of Mass, Inc.* v. *Altshuler*, and *S. Ill. Builders Ass'n* v. *Ogilvie*.

[68] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2755 n.40.

action program within the framework of collective bargaining in order to comply with OFCC rules regarding affirmative relief. The court noted that although Executive Order No. 11246 was a valid executive action, it could not "override contradictory congressional expressions." Finding precedent in *Contractors Association,* the *Weber* court held that Title VII's specific prohibitions (in Section 703(d)) had priority over general executive orders.[69]

Circuit Judge Gee concluded that:

> If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall before this direct congressional prohibition.[70]

Amicus strongly suggests that the priority of a specific congressional prohibition over a general executive command be maintained. The wishes of Congress as representatives of the people should not be thwarted by executive legislation, especially upon such an important subject as racial discrimination in employment.

CONCLUSION

The use of racial quotas as a remedy for racial discrimination is no doubt a very sensitive and controversial topic. Its application should be used sparingly and only when prior racial discrimination by an employer is actually found and other remedies have failed. If discrimination is discovered, then it must

[69] *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 563 F.2d at 226-27.

[70] *Id.,* 563 F.2d at 227.

be located at the plant site. A general societal discrimination standard cannot justify specific remedies to discriminated individuals.

When no history of prior discrimination is present, the imposition of a non-remedial racial quota becomes unlawful reverse discrimination. The prohibitions found in Title VII concerning preferential discrimination override the general Executive Order No. 11246 mandate for affirmative action.

By upholding the opinion of the Court of Appeals, this Court will act to protect the rights of all individuals against discrimination at the workplace. In addition, seniority systems, vital to labor relations will be preserved from illegal distortions i.e., the dual racial seniority lists used at the Gramercy plant.

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MOTION FILED
FEB 24 1979

Supreme Court, U. S.
FILED
FEB 24 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER, 1978 TERM

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
vs.
BRIAN F. WEBER, et al., *Respondents.*

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner,*
vs.
BRIAN F. WEBER, et al., *Respondents.*

No. 78-436

UNITED STATES OF AMERICA, et al., *Petitioners,*
vs.
BRIAN F. WEBER, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER

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In the Supreme Court

OF THE

United States

OCTOBER, 1978 TERM

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

VS.

BRIAN F. WEBER, et al., *Respondents.*

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner,*

VS.

BRIAN F. WEBER, et al., *Respondents.*

No. 78-436

UNITED STATES OF AMERICA, et al., *Petitioners,*

VS.

BRIAN F. WEBER, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER

Pursuant to Rule 42, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of respondent Brian F. Weber. Consent to the filing of this brief has been granted by respondent Brian F. Weber and by petitioners United Steelworkers of America and Kaiser Aluminum & Chemical Corporation. Petitioner United States has withheld consent,

but has stated that it does not oppose the filing of a brief pursuant to this motion. Those consents have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal Foundation's members, contributors, and supporters are employers or employees who have expressed concern regarding the scope of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq.*), the issue in this case. In order to give voice to these interests, the Board of Trustees of Pacific Legal Foundation has authorized the filing of this brief.

Pacific Legal Foundation strongly believes that the decision of the Fifth Circuit Court of Appeals in this case reflects an interpretation of Title VII of the Civil Rights Act of 1964 which is both legally correct and socially sound. Congressional intent, evidenced during the debates prior to the passage of Title VII, and recent determinations of this Court both indicate that this law is to be utilized to remedy specific employment discrimination rather than to correct imbalance in an employer's work force created by factors other than the employer's discriminatory treatment. A decision contrary to that rendered by the court below would not only run counter to these legal precedents, but would also create grave problems for nonminority workers who would be compelled to forego benefits rightfully earned. Such a decision would also place employers in the position of having to devise employment programs and incentives which bear no reference to past employment activities. This decision, far from ensuring racial equality and harmony,

would greatly increase racial tension in the national work force.

Pacific Legal Foundation believes that the issue of racial equality in employment, which can be promoted by a reasoned interpretation of Title VII based on past precedent, is of utmost concern to all the citizens of our country. It also believes that, as an organization whose supporters include both workers and employers, it can present this Court with a perspective which might otherwise be absent from this case.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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February 1979

In the Supreme Court

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United States

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner,*

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 563 F.2d 216 (5th Cir. 1977).

STATEMENT OF THE CASE

In 1974, Kaiser Aluminum & Chemical Corporation (hereinafter Kaiser) and United Steelworkers of America (hereinafter United Steelworkers) entered into a collective bargaining agreement which was in part designed to increase the number of minority craft workers.[1] This agreement established an on-the-job craft training program for employees without prior craft experience and specified that admission to the program would be made on a ratio of one minority worker for every nonminority employee admitted until the percentage of minority craft workers approximated the minority population in the area of each plant. In other words, fifty percent of the available slots in the program were reserved for minority workers. While eligibility for training rested on plant seniority, in order to meet the one for one ratio, two seniority lists were established, one for minorities and one for others. The most senior applicants for the program were selected from each list. The named plaintiff in this case, Brian Weber, a nonminority worker, applied for the program and was turned down although several minority applicants with less plant seniority were selected from the minority list for participation.

Weber brought suit in United States District Court alleging that by preferring minority employees with less seniority for admission to the training program, Kaiser

[1] *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 218 (5th Cir. 1977). The percentage of minority craft workers at Kaiser's plant in Gramercy, Louisiana, the work place concerned in this suit, was less than the percentage of minority workers in the area surrounding the plant. *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 764 (E.D. La. 1976). However, the district court found and the appellate court agreed that this imbalance was not due to Kaiser's discriminatory practices. *Weber*, 563 F.2d at 224.

and United Steelworkers had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, *et seq.* Both the district court and the Fifth Circuit Court of Appeals ruled in favor of Weber. The court of appeals approved the district court's finding that Kaiser had not been guilty of past discriminatory hiring or promotional practices at Weber's plant and held that in the absence of prior employer discrimination, the challenged program was not a remedy permissible under Title VII, but rather an unlawful racial preference prohibited by Sections 703(a) and 703(d) of that statute. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 224 (5th Cir. 1977). Further, the court refused to accept the suggestion that the program could be sanctioned as a general attempt to correct past societal discrimination and indicated:

> "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII." *Weber*, 563 F.2d at 225.

Thus the issue to be determined in this case is whether an employer who has not been guilty of unlawful discrimination against minorities may be permitted to carry out a program which grants preferences to a minority group in general solely because of race.

It is the position of amicus curiae Pacific Legal Foundation that the court of appeals was correct in determining that the program here at issue is not permitted under Title VII. This interpretation is required if the legislative intent inherent in the passage of Title VII is to be preserved. Even more importantly, this interpretation is necessary in order that all members of the national work force

can be assured that their rights to equality in employment opportunity will be preserved.

ARGUMENT

I

KAISER'S MINORITY PREFERENCE PROGRAM VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, Congress was concerned with achieving equal employment opportunity for all *individuals* regardless of their race, color, religion, sex, or national origin; with removing barriers which in the past have favored certain majority employees over others; and with making *individuals* whole for injuries suffered because of past unlawful employment discrimination. *Los Angeles Department of Water & Power v. Manhart*, 46 U.S.L.W. 4347 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In order to carry out these purposes, Congress has specifically proscribed certain employment activities. Section 703(a) prohibits an employer from classifying individual employees according to race, color, religion, sex, or national origin in a manner which would adversely affect their employment status.[2] Section 703(d) prohibits either an em-

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[2]Title VII, Section 703(a), 42 U.S.C. § 2000e-2(a), in its entirety provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or

ployer or a union from discriminating against an individual because of race, color, religion, sex, or national origin in selection for employment training programs.[3]

That these prohibitions apply to protect nonminority individuals is unquestioned. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). However, since *McDonald*, the question has arisen whether these protections for nonminorities may be altered to some extent if an employer engages in action specifically designed to aid minority groups. Under the facts of the present case, the court of appeals held that they may not. This holding is supported by the language of Title VII, its legislative history, and decisions of this Court.

A. Kaiser's Program Was Not Designed to Remedy the Effects of Unlawful Employment Discrimination

In order to ascertain the propriety of the ruling below, it is first necessary to define precisely that "discrimination" which would allow a preferential program under Title VII. Kaiser, the United States, and the Equal Employment Opportunity Commission (hereinafter EEOC) all agree with the court of appeals that prior unlawful discrimination is

tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3]Title VII, Section 703(d), 42 U.S.C. § 2000e-2(d), in its entirety provides:

"(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

necessary before a program such as Kaiser's could be judicially upheld. However, they disagree with the court's determination that specific acts against specific employees are needed to constitute the necessary discrimination. Kaiser argues that, in the context of a racially imbalanced work force, such unlawful discrimination occurs if there exists a general history of specific wrongs against minority group workers. Kaiser's Brief for Petitioner (hereinafter Kaiser Brief) at 46-49. EEOC argues that it occurs if there has been "apparent" specific discrimination against minority workers by the employer. Brief for the United States and EEOC (hereinafter EEOC Brief) at 17, 41. Both these arguments fall short of the mark. Title VII, its legislative history, and judicially established precedent make plain that without findings of specific employer actions which serve to retard a minority's progress in the work place because of his race, the employer cannot enact a program giving minorities preferences because of race.

Section 703(j) states clearly that Kaiser would not be *required* "to grant preferential treatment to any individual of a group underrepresented in its work force because of race, color, religion, sex or national origin."[4] This section's

[4]Title VII, Section 703(j), 42 U.S.C. § 2000e-2(j), in its entirety provides:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any

legislative history, however, goes further to indicate that such preferential treatment is *forbidden.*

The bill which became Title VII originally did not contain Section 703(j). However, even before the inclusion of this section, Senators Case and Clark, the bill's floor managers in the Senate, filed a report declaring:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.
>
> "[The employer] would not be obliged or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or, once negroes are hired, to give them special seniority rights at the expense of white workers hired earlier. . . ." Interpretive Memorandum of Title VII of H. R. No. 7152, submitted jointly by Senators Clark and Case, Floor Managers, 110 Cong. Rec. 7213 (April 8, 1964).

The lower courts have generally held that Section 703(j) does not ban the use of preferential programs to change the racial composition of a work force, provided that the imbalance can be attributed to unlawful discrimination. *See Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). Therefore, the cases which have allowed preferential

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labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

remedies in spite of Section 703(j) have included some finding of prior discrimination on the part of the entities to whom the preferential program applies. This finding of discrimination has consistently taken the form of specific activities which have adversely affected minority individuals because of their race. *See*, for example, *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 501 F.2d 622, 634-39 (2d Cir. 1974); *United States v. International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). It is only after findings of these specific acts of discrimination have been made that remedial action in the nature of hiring or promotion quotas may be justified.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), an employee charged his employer with a Title VII violation when he was discharged due to his refusal to work certain shifts because of his religious convictions. In finding that there had been no violation, this Court indicated that if Hardison received Saturdays off, the treatment which he alleged was required under Title VII, "TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Hardison*, 432 U.S. at 81. In other words, some other employee would have been penalized because he was not a member of a religious minority. The Court then continued:

> "*Title VII does not contemplate such unequal treatment.* The repeated, unequivocal emphasis of both the language and legislative history of Title VII is on elim-

inating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities." *Id.* (emphasis added).

In responding to Hardison's arguments that earlier Supreme Court cases granting some minority individuals retroactive seniority supported his claims for preferential treatment, this Court responded by distinguishing certain of those cases:

> "In Franks [*v. Bowman Transportation Co.*] we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the *strong congressional policy of making victims of discrimination whole.* Franks is not dispositive of the present case *since here there is no evidence of past discrimination that must be remedied.*" *Hardison,* 432 U.S. at 79 n. 12 (emphasis added).

Thus *Hardison* points out two important factors in determining whether an employer's actions which aid minorities in ways which affect nonminorities, are permissible under Title VII. First a court must consider whether there has been past discrimination and second, whether the program is designed to make victims of past discrimination whole.

These two factors were considered by the court of appeals in the present case. Both the trial and appellate courts found that although there was an imbalance of minority workers at Kaiser's plant when compared to the minority population surrounding the plant, there was no evidence of specific discriminatory practices on the part of Kaiser. *Weber,* 563 F.2d at 224. The court of appeals recognized that racially based "affirmative action" plans were permissible under Title VII in order to remedy the effects of past

discrimination against specified individuals; however, since it had found no discrimination on the part of Kaiser, it ruled the company's program to be in violation of Title VII.

Support for this position may be found in *Regents of the University of California v. Bakke,* 46 U.S.L.W. 4896 (1978). Although *Bakke* did not involve Title VII, the opinions therein are instructive since that case also dealt with the implementation of preferential quota relief for minority group members in the absence of specific past discrimination against them by the entity instituting the relief. In addition, in making their determinations, the members of the Court frequently looked to Title VII precedents for guidance.

After reviewing several cases, some construing Title VII, Justice Powell concluded:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Bakke,* 46 U.S.L.W. at 4906 (opinion of Powell, J.).

In explaining this observation, Justice Powell noted that in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971):

> "the Court emphasized that: 'the Act [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.' *Id.,* at 430-31. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing 'imbalance' may not be required under Title VII, 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition *that find-*

> ***ings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.*** *Bakke*, 46 U.S.L.W. at 4907, n.44 (opinion of Powell, J.) (emphasis added).

In his reference to the necessity for findings of identified discrimination, Justice Powell indicated that before a preference can be valid under Title VII, far more is required than the presence of the "apparent" or historical activities which EEOC and Kaiser postulate validate the program here at issue. Justice Powell's entire opinion indicates that he had eliminated generalized past improper actions against minorities or past underutilization as a valid basis for preferential programs. *See Bakke*, 46 U.S.L.W. at 4903, n.36. In addition, the "identified" discrimination which he emphasized is definitionally far different from "apparent" discrimination. Even were this not the case, however, Justice Powell speaks of the necessity for "findings." In the present case, there simply were no findings of discrimination made prior to the implementation of the Kaiser program. The factors which Kaiser and EEOC now mention as supporting the program appear to be no more than *post hoc* justifications. *Cf. Department of General Services v. Superior Court*, 85 Cal. App. 3d 273 (1978).

This Court's decisions in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), support the necessity for findings of specific employer activity which denied minorities equal access to employment opportunities before a racial imbalance can be considered to be unlawful discrimination. In both *Franks* and *Teamsters* the employer had been found to have engaged in specific practices which

denied minorities employment opportunities given to nonminorities. In each case the Court determined that Title VII had been violated and ordered retroactive seniority to restore discriminatees to the place they would have occupied in the employment scheme, absent illegal discrimination. The Court, however, did not hold that all minority employees or applicants who had been turned down for preferred positions be awarded the seniority automatically. Rather, it indicated that before a minority applicant for retroactive seniority was awarded this relief, the company be given an opportunity to show he was not the victim of the discrimination. *Teamsters*, 431 U.S. at 362; *Franks*, 424 U.S. at 772.

If the definition of unlawful discrimination included a racially imbalanced work force created by generalized societal or "apparent" employer action against minorities, as argued by Kaiser and EEOC, then there would have been nothing the employers in *Franks* or *Teamsters* could have shown to indicate that the minorities therein were not the victims of unlawful discrimination. The companies' work forces were clearly imbalanced racially and the minority workers had obviously been subject to the same type of historical pressures as those Kaiser argues pertained to its minorities. Further, there was far more than apparent employer activity at issue in *Franks* and *Teamsters* since it had already been determined that the companies had carried out programs antithetical to minority advancement. The Court further held in *Teamsters* that minority members who had never applied for a preferred job must show that they were victims of discrimination before they would be entitled to preferential relief. *Teamsters*, 431 U.S. at

364. The fact that this Court indicated the *Franks* and *Teamsters* minority workers were not automatically entitled to relief points to the conclusion that before there can be unlawful discrimination which Title VII can remedy, there must be a specific showing of employer action which has impeded the progress of a minority individual.

Since no such showing was made in this case, there has been no unlawful discrimination on Kaiser's part. Without this unlawful discrimination Section 703(j) prohibits an employer from preferring one racial class over another.

The underrepresentation of minority craft workers in Kaiser's work force when compared to the population surrounding the plant may be an unfortunate occurrence. However, as was noted by this Court in *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977), not all unfortunate occurrences in the work place, even if they affect a minority group adversely, can be considered unlawful and within the purview of Title VII.

B. The Kaiser Program Was Not Designed to Aid Victims of Any Type of Discrimination

In addition to considering whether unlawful employment discrimination which can be remedied by Title VII has occurred, it is also necessary to consider whether the minorities concerned in Kaiser's program must have been victims of past discrimination before they could be given preferential treatment over nonminorities. As has been discussed above, since Kaiser had committed no unlawful discriminatory acts, preferential treatment is, *per se,* improper under Title VII. However, even under the broad definitions of discrimination advocated by Kaiser and

EEOC, Kaiser's classwide preference program is still impermissible under Title VII if Title VII requires that a remedial program direct itself to aiding specific victims of discrimination.

Title VII does more than provide for remedies for past discrimination. It also demands equality of opportunity for all individuals. This Court observed in *Los Angeles Department of Water & Power v. Manhart,* 46 U.S.L.W. at 4349:

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.' The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." (Emphasis in original, citation omitted.)

Under the holdings of *McDonald, supra,* and *Hardison, supra,* the individual is protected by Title VII whether he is a member of a minority or a nonminority group.

In order that a nonminority individual's right to equality of opportunity, regardless of his race, not be forgotten in a quest to fulfill the remedial purposes of Title VII, it is necessary to ensure that an employer's remedial program be focused only upon restoring discriminatees to the places they would have occupied absent discrimination. This "make whole" or "rightful place" reasoning was adopted by the court of appeals in this case. As was explained by that court, it is only under this approach that:

> "no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race;

rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them." *Weber,* 563 F.2d at 225.

Several decisions of this Court support the propriety of this reasoning by indicating that the scope of Title VII extends only to remedying the wrong done to the individual. In *Albemarle Paper Co. v. Moody,* 422 U.S. at 418-19, the Court held:

> "'[W]hen a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'" (Citation omitted.)

This emphasis on individual relief for individual wrongs was reaffirmed by this Court in *Franks,* 424 U.S. at 772. There the Court recognized that minority individuals who were not victims of the employer's discriminatory policies would not be entitled to preferential relief.

In the instant case there was certainly no showing that the minority individuals to be aided by Kaiser's program had been the victims of illegal discrimination if it is to be defined as specific employer activity, since the courts below found that none had occurred. Nor was there even any showing that these persons had been actual victims of broader generalized or "apparent" policies which favored whites. Without this showing, Kaiser's program violated Title VII's requirement that individuals of all races be granted equality of opportunity; it then became a vehicle

for furthering class stereotypes which Title VII was designed to eradicate.

As this Court noted in *Manhart,* 46 U.S.L.W. at 4349, when outlawing a sex-related classification:

> "Practices which classify employees in terms of religion, race or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals [which Title VII requires]."

Here there simply was no scrutiny of individuals, neither those to be aided, nor those to be disadvantaged by the racial preference established by Kaiser. Lack of this scrutiny is not only antithetical to the individual emphasis of Title VII and violative of the rights guaranteed to all workers under the statute, it may also do a disservice to minority workers in that preferential programs not designed to remedy specific wrongs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection." *Bakke,* 46 U.S.L.W. at 4904 (opinion of Powell, J.).

II

JUDICIAL APPROVAL OF KAISER'S PROGRAM WOULD NOT FURTHER THE GOAL OF VOLUNTARY COMPLIANCE WITH TITLE VII NOR ENHANCE PUBLIC POLICY

Both Kaiser and EEOC argue that in enacting Title VII, Congress desired to encourage voluntary compliance with the Act and that to uphold this purpose, this Court must approve Kaiser's voluntary program. Kaiser Brief at 23-30; EEOC Brief at 29-35. Certainly it is true that voluntary compliance is preferable to actions taken only after

lengthy litigation. However, petitioners' arguments for voluntary compliance mistake the nature of that policy.

As has been shown above, an employer is allowed under Title VII to adopt a preferential program based on race only if the program meets two criteria: (1) it is based upon findings of past unlawful employment discrimination defined as specific employer activities which have retarded minority opportunity, and (2) it is designed to aid specific victims of this unlawful employment discrimination. Kaiser's program meets neither of these criteria and is thus in violation of Title VII. Therefore, approval of Kaiser's program would do nothing to further voluntary compliance with the Act, rather it would give sanction to voluntary disregard.

It is also argued by both Kaiser and EEOC that employers and/or unions may go further than Title VII requires in order to further "public policy" and that, based on this, approval should be given to the program here at issue. Kaiser Brief at 29; EEOC Brief at 37-38.

This argument is also without merit. First, it presupposes the fact that although Title VII does not require the preferential program, it does not forbid it. This is not true as discussed at Section I-A, *supra*.

Second, public policy would not be furthered by the approval of such a program. In stressing the need for findings of constitutional or statutory violations prior to the institution of a preferential program, Justice Powell noted in *Bakke*, 46 U.S.L.W. at 4906-07:

> "Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." (Footnote omitted.)

In a like manner, without these findings, which are absent from the present case, there is no public policy to be furthered by the approval of a program which favors one race over another.[5]

Furthermore, a program favoring one racial group of employees, absent an attempt to remedy victims of past specific discrimination, runs counter to public policy. This theory was given voice by Justice Douglas in his dissent in *Defunis v. Odegaard*, 416 U.S. 312, 341-43 (1974), when he noted the divisive effects of racial classifications. These classifications may tend not only to exacerbate racial attitudes among nonminority groups, but may also serve to stigmatize minorities. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973).

III

KAISER'S PROGRAM DOES NOT MEET THE TITLE VII REQUIREMENTS OF REASONABLENESS

Under Section 706(g), a district court, even after a finding of intentional discrimination, may order only "such affirmative action as may be appropriate."[6] Thus the reme-

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[5] In this respect, it is also necessary to note that in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778-79 (1976), which both EEOC and Kaiser cite in support of their public policy argument, findings, such as Justice Powell requires, had been made.

[6] Title VII, Section 706(g), 42 U.S.C. § 2000e-5(g), provides in pertinent part:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may

dies for discrimination, if any, authorized under Title VII are those which equity decrees to be fair and reasonable. Although Section 706(g) is directed toward the courts rather than employers, it seems illogical to allow an employer to do that which a court, operating with full substantive and procedural guarantees, may not accomplish. Therefore, it is clear that in the present case, even were discrimination present, the employer's program to remedy it must be appropriate and reasonable before it can be upheld under Title VII.

In making their arguments in support of the program at issue, both Kaiser and EEOC stress its reasonableness. Kaiser Brief at 51-60; EEOC Brief at 48-54. This emphasis ignores the fact that the program represented a quota reserving fifty percent of the available training positions for minority workers. Racial quotas, whatever their specific percentage, have traditionally been viewed as the least reasonable of all affirmative action devices to be used only as a last remedial resort. *Patterson v. American Tobacco Co.*, 535 F.2d at 274; *Kirkland v. New York Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975). Under the circumstances of the present case, in which the employer had engaged in no specific discriminatory activity against minorities, resort to this most drastic measure cannot, in and of itself, be considered reasonable.

Nor does the fact that the training program offered new opportunities to nonminorities as well as minorities make

be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

the quota any more reasonable. Since selection for the program was to be based on seniority, nonminority workers had the expectation that their justly earned seniority would not be negated. Although *Franks* indicated that this seniority expectation need not always be honored, as discussed in Section II, *supra*, the case at bar is not one in which it could be overlooked for public policy reasons.

This Court has not previously ruled on the validity of promotional quotas which interfere with established seniority expectations. However, lower federal courts have referred to their inequity and have failed to approve them, although they have approved hiring quotas. *Bridgeport Guardians, Inc.*, 482 F.2d at 1340-41. The program in this case is closely related to one dealing with promotions. Therefore, the same reason that lower courts have stressed in relation to the inequity of promotional quotas also applies to the preference here: such quotas adversely affect an identifiable number of nonminority persons who legitimately expected to be treated in a manner which made no racial reference. *Kirkland*, 520 F.2d at 427.

In *Trans World Airlines, Inc. v. Hardison,* this Court discussed an employer's duty under Title VII to take "reasonable" measures to accommodate the religious needs of minority religious groups. The Court found that in the situation presented in that case, in which there was no prior discrimination or no effort to make past discriminatees whole:

> "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual

rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Id.* at 81.

In the present case, as in *Hardison*, there has been no finding of prior discrimination and no attempt made to make discriminatees whole. Thus, it cannot be concluded that Congress would have considered reasonable or appropriate Kaiser's "affirmative action" program which interfered with the seniority expectations of nonminority workers and denied them access to fifty percent of the available positions.

The argument that Kaiser's program was unreasonable finds further support in this Court's discussion of the remedy ordered for the discrimination which was found in *International Brotherhood of Teamsters v. United States*, 431 U.S. at 372-75. In *Teamsters* specific discriminatory action had been found to exist and the Court approved relief which extended only to putting discriminatees in their "rightful places." However, even in this past discrimination—"rightful place" context, which is not present in the instant case, the Court cautioned that the remedial needs of the minorities must be carefully balanced with the legitimate expectations of employees innocent of wrongdoing. *Id.* at 372. Specifically, the Court stated:

> "Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' " *Id.* at 375 (citations omitted).

Again, if it is important that courts which operate with full substantive and procedural guarantees are constrained to be solicitous of nonminority rights in fashioning minority aid programs, it is even more important that an employer be aware of these rights. Furthermore, if such caution is required when the relief ordered extends only to putting specific victims of proven discrimination in their "rightful places," even more caution would be required when there have been no findings of specific discrimination and no attempt made to aid specific victims.

In the present case, Kaiser has ordered immediate implementation of a program which denies nonminorities access to fifty percent of available training positions. This decision was not based upon the need to remedy specific discrimination against specific victims, but only upon observation of a racially imbalanced work force. Such action ignores the equitable consideration of nonminorities' rights which this Court in *Teamsters* found to be so vital. Without making allowances for these considerations the Kaiser program can be seen as neither reasonable nor appropriate. Therefore, it violates the commands of Title VII.

CONCLUSION

Title VII prohibits employment discrimination against all individuals because of their race. This prohibition means that an employer's program, which gives minorities employment preferences, must be fashioned only to remedy the effects of specific past discriminatory activity and to put the victims of this activity in the places which they would have occupied absent discrimination. Kaiser's program was not designed to achieve these ends. It was not

based upon a finding of prior discrimination of any kind and granted a group preference without any consideration toward putting discriminatees in their "rightful places." The program was, therefore, violative of the individual rights guaranteed to nonminority individuals under Title VII. For these reasons it is submitted that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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February, 1979

Nos. 78-432, 78-435, and 78-436

Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

BRIAN F. WEBER, ET AL.
Respondent

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner

v.

BRIAN F. WEBER, ET AL.
Respondent

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners

v.

BRIAN F. WEBER, ET AL.
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE POLISH AMERICAN CONGRESS AND THE NATIONAL ADVOCATES SOCIETY AS AMICI CURIAE

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February 24, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
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UNITED STATES OF AMERICA, ET AL., *Petitioners*

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Respondent

BRIEF OF THE POLISH AMERICAN CONGRESS AND THE NATIONAL ADVOCATES SOCIETY AS AMICI CURIAE

This brief amici curiae is filed with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI

The amici are two national organizations composed of Americans of Polish heritage. The Polish American Congress was founded to protect the civil rights of

Americans of Polish heritage and to promote their welfare. The National Advocates Society, composed of American lawyers of Polish heritage, believe it is their responsibility to participate in these proceedings both as attorneys interested in the promotion of civil rights for all Americans and as advocates for the Polish American Community.

Both organizations filed a joint brief amici to this Court in the Bakke case.[1] As we stated there, the heritage of Polish Americans and their own history in America are inextricably involved in the fight against discrimination, with the result that we believe we have a vital interest in the issues presented by this case and feel that this Court should have the benefit of our concerns so that this Court's final decision may reflect a full range of views and not the narrow perspective outlined in the material submitted to this Court on the application for certiorari here.

Much has been written on the subject matter involved herein and this Court is also considering another case at this term involving veterans' preferences which also has a bearing on what is being argued here. Indeed, the complexities of the issues here and the contradictions of the various efforts to resolve such complexities has resulted in the institution of the so-called "Sears" case in the U.S. District Court in Washington, D.C. It is not the purpose of this brief to recite authority and comments previously made except where absolutely necessary, particularly since much of this material is well known to this Court, and has already been reviewed by the courts below as well as the parties themselves in their briefs. It is the purpose of

[1] *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978).

this brief to give new perspective in what should be America's continuing effort to give equality to its subjects consistent with the Constitution and law and especially without regard to race, color, creed, sex, and national origin. To put it another way and perhaps more directly, the fight against prohibited discrimination includes more than consideration of race and sex and should not be conducted through the creation by self-serving authority figures of new target groups to bear the impact and disadvantages resulting from preferred treatment given to those who may from time to time be favored. Further, if the fight against prohibited discrimination is to be conducted in a certain fashion with certain practices, then the Constitution and the law, as well as fundamental fairness, require that the same considerations be extended to all persons and groups discriminated against and affected and not just some.

ARGUMENT

As we pointed out in our brief in the *Bakke* case, for reasons not entirely clear to us, efforts to fight prohibited discrimination have focused primarily, if not exclusively, on race and sex, even though Congress, when it enacted the series of laws dealing with discrimination, and various Presidents when they issued executive orders, concerned themselves with five areas of discrimination, race, color, creed, sex, and national origin, without giving any one area a higher priority over any other area.[2] This preoccupation has resulted in a number of developments, the substance of which has caused (a) new patterns of discrimination, (b) reduced progress in overcoming the effects of racial and sexual discrimination, (c) abandonment at least to

[2] E.g., Title VII, 42 U.S.C. 2000(e), Executive Order No. 11246.

some degree of such traditional American values as hard work, competition by merit, and freedom of choice, (d) a sense of duplicity and confusion regarding government policies and practices, and (e) disillusionment by many, if not most, Americans in the practical meaning and impact of Constitutional guarantees of equal protection in this area of activity.

In making this observation, we do not wish to take away from the positive results achieved to date; instead, we want to point out how much more could, should, and will be accomplished if appropriate direction is given by this Court as to what is Constitutionally permissible, as well as whether specific private and governmental initiatives, policies, and practices measure up to what Congress legislated and Presidents directed, instead of permitting the bureaucracy to reflect what may from time to time be politically fashionable or what certain authority figures feel is their personal sense of justice.

For the sake of brevity, let us now relate these observations to the case at hand.

Perhaps the best place to start is with an examination of a passage contained in the dissent of Judge Wisdom of the immediate court below. After concluding that employers may compensate employees for societal discrimination without giving any specifics on what he means by this (a proposition which is directly in issue here), he then amazingly and without any justification therefor asserts that: "If Americans of Irish, Italian, Jewish or German extraction were allowed employment preferences as compensation for undoubted past societal discrimination, Title VII would be eviscerated."[3]

[3] 563 F.2d 216, at page 235.

In short, in his mind, Title VII, Executive Order 11246, and the equal protection clause are available only for the benefit of certain favored groups. What perhaps is most amazing and disheartening about this conclusion is that it was reached without any evidence of the impact of conceded societal discrimination on these "disfavored" groups or care about the potential disparate impact the present private remedy at issue here would have on such "disfavored" groups. Such action and thinking attacks and destroys any feeling of sacrifice for and belief in the "common good."

But Judge Wisdom is not the only practitioner of this narrow mind set. The Civil Rights Commission is another excellent example.[4] Most government agencies collect data in this area in only five categories, Black, Hispanic, Native American, Asian American, and white other than Hispanic, for both males and females. There is no empirical or practical justification therefor and the Office of Management and Budget[5] has specifically authorized that data can be collected in more categories though its emphasis on the five previously enumerated categories creates serious questions about the legality and constitutionality of collecting data in such a limited fashion. For example, the Census Bureau, Immigration and Naturalization Service, Visa office, and the present President himself[6] collect data in many more and different categories. It is submitted that in the absence of sufficient justification thereof,

[4] Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 95th Congress, *Civil Rights Commission Authorization Act of 1978*, pp. 199-208, 533, 620.

[5] See Appendix this brief, pp. 1a-6a, Esp. 4a "Civil Rights Compliance Reporting."

[6] See Appendix this brief, pp. 7a-14a, Esp. 10a.

this governmental practice is discriminatory in and of itself, and is one of the primary reasons why the agreement at issue here is invalid. Attention is called to the fact that the instant agreement provides that the groups to be favored under the agreement are the minorities as defined by EEOC. While the record is not clear why this was done, the implication is strong that it was done more in response to government pressure than the natural result of a comprehensive survey of the relevant work force indicating what groups were truly "underutilized" or "underrepresented."

One member of this Court, Justice Blackmun, in the *Bakke* case, stated that he yields to no one in his earnest hope that the time will come when an "affirmative action" program is unnecessary and is in truth only a relic of the past. We suggest that that time will never come if we continue to treat some of our citizens, albeit different ones, as second class citizens even though they never discriminated against anyone and, in many instances, fought for the equal rights of those now being given preference for racial and sexual reasons. We also suggest that that time will never come if we fail to define what we mean by "societal" discrimination and continue on the road of substituting equality of result for equal opportunity.

It has been estimated that there are more than 8 million people illegally in the United States and various proposals have been made to legitimize their status. The United States, in keeping with its unique and special tradition as an immigrant country, has welcomed thousands of refugees over the past years. Our immigration laws are designed so that those who have established legal status can, in turn, bring in their family members. The resulting immigration flow is such that the majority of such flow represents people who are

part of the groups that are being favored by present government policies and practices, as well as the agreement here. Are all of these persons to be considered victims of "societal" discrimination? And what should be the impact of such flow on the numbers game that the government and the courts presently use to gauge rights and remedies? It has been suggested that "affirmative action" through preferences is justified until such time as the percentage a favored group bears to the total population is equivalent to the percentage a favored group bears to the total work force of the employer. Aside from other objections, we believe that this is nothing more than a quota and does not allow for situations like that in pro basketball where blacks as a group dominate because of their natural ability and their cultural inclination for that sport. Such a concept also fails to allow for the situation found presently in the Equal Employment Opportunity Commission where more than 50 percent of the work force consists of blacks.

We raise these questions and issues not to be difficult or resentful for we believe that the groups now being favored deserve attention to their plight. We raise these questions and issues to point out there are others who have similar problems and also deserve attention and similar effort. We raise these questions and issues to point out that it is quite different to give a person a partial advantage for service to his or her country as distinguished from giving a person a total advantage because of his race and sex.

In the former instances, those disfavored still have a chance to compete; in the latter, those disfavored are excluded and then solely because of race and sex. It is the latter factor that makes the present plan illegal, for it restricts a person's ability to gain "admission to" a

training program solely because of his race and sex in violation of Title VII.

While we agree with the United States Steelworkers of America that employers should and do have a great deal of flexibility in choosing its work force, we disagree with its contention that employers can privately contract to create quota schemes to correct what they perceive to be "societal" injustice given the present circumstances. The present scheme is essentially nothing more than the two track system this Court declared invalid in *Bakke*. Perhaps there is an area of discretion where employers and unions can reach voluntary agreements to correct discrimination, but such agreements can be constitutionally justified only if there is a comprehensive data and analytical base indicating such discrimination and the impact of the proposed remedy has on everyone affected by it. In addition, allowance must be made for each group that makes up the mosaic called America and this Court should give notice to everyone that it will no longer tolerate the practice of lumping all non-favored groups into a category labeled "none of the above," "other," or "white other than Hispanic." Such practice is particularly invidious for it presupposes that every subgroup in that category has the same opportunity for success, a premise that patently is absurd.

We agree with the majority opinion of the court below that Title VII prohibits any agreement that is race, sex, color, religious, or ethnic conscious; however, we go further and state that if this Court does permit race to be taken into account in any agreement of the type considered here, it must also require that such agreement take into account sex, color, religion, and ethnicity or give a good reason why it excludes any

such factor and the groups affected thereby. The present agreement fails to do so.

In reviewing in a broad perspective what is occuring presently in this area, an objective observer would wonder a) why no comprehensive survey of all of the groups constituting the mosaic called America has ever been conducted to justify the present practice of favoring certain groups, b) why Hispanics, over 90% white according to the Census Bureau, are favored, while other sub groups of the white race are not even examined but summarily dismissed from consideration, c) why no allowance has been made in the categories presently established in practice that the condition of Mexican origin people may differ from Puerto Rican or Japanese from Vietnamese etc. d) why considerations of prohibited discrimination usually end up being discussed in an exclusively black and white, or male-female context, causing new stereo types to be formed and a distortion of all of the relevant considerations if we are truly committed to end and correct all, not just some, forms of prohibited discrimination e) why aside from the general non-controversial goal of eliminating prohibited discrimination and the effects therefore, there is an absence of specific definable objectives of what we wish to achieve by affirmative action programs f) by what legitimate authority and criteria does the bureaucracy, Congress, the President and the courts determine that it is permissable to favor one group over another even where, unlike here, an adequate data and analytical base has been established.

Perhaps it were these considerations that has resulted in Congress in failing to specifically approve the present bureaucratic policies and practice dealing with affirmative action and instead (contra to what the United Steel Workers state in their brief) simply declare that no one or agency, private or public, directly

or under the guise of an affirmative action plan, can deny anyone an opportunity to compete because of his race, color, creed, sex or national origin. Perhaps this is why some observers had concluded that affirmative action in the sense that it puts pressure on employers to give preferences should be restricted to only those situations where actual discrimination is proven and definite individuals can be provided specific relief.

Finally, we feel the preoccupation and resulting narrow focus have limited the usual American ingenuity that results in creative solutions to complex and intractable problems. The thought occurs to us that the government and private industry ought to explore the utility of using in this area the present practice of giving veterans a certain point advantage. While we cannot say at this time whether such a system is constitutionally and legally permissable, it does have many advantages. First, it does address the problem of past and present discrimination. Second, it can be limited through the use of appropriate criteria to those who actually have suffered discrimination here in the United States. Third, it can be extended easily to other disadvantaged and discriminated groups and individuals beyond those presently favored. Fourth, it should reduce the reliance on quotas, timetables, and goals. Fifth, it would not preclude anyone from competing. Sixth, it would tend to emphasize individual effort and initiative over group rights. Seventh, it would be consistent with the philosophy exposed by this Court in the *Bakke* case where this Court appeared to rule that race and ethnicity (and presumably sex, color, and religion) can have some weight but not be the dominant factor in assigning educational opportunities.

We feel more should be done to explore all of the ramifications of this initiative and feel that this Court could help point the way.

CONCLUSION

As America begins its third century of existence, we believe that this Court should enunciate constitutional principles of equality that transcend moods of political fashionability, emotion, and collective "guilt." We are disappointed that the drive for equality and opportunity for everyone that began with the Civil Rights movement of the 1950s and 1960s is turning into a battle for preference and privilege where groups and the individual who are perceived to be politically weaker are disregarded. We believe America can do a better job in securing the benefits of equal opportunity for everyone so that we do not ever have to ask whether any group received too much too soon but instead be secure in the belief that each group and individual had a full and fair opportunity to compete, and that the status of any such group and individual in any field of endeavor, (regardless of their numbers) is the result of honest competition and not discrimination, either for or against them.

The judgment of the Court of Appeals should be affirmed with such direction as this Court feels necessary to guide future efforts in this area.

Respectfully submitted,

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APPENDIX

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 12, 1977

CIRCULAR No. A-46
Revised
Transmittal Memorandum No. 6

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Revision of Circular No. A-46, Exhibit F, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting"

Attached is Exhibit F, Revised, which replaces the earlier version entitled *"Race and Color Designations in Federal Statistics."* This revision will meet the needs which have been expressed by the Congress and the executive branch for standardization of racial and ethnic data which is collected and published by Federal agencies.

/s/ BERT LANCE
Bert Lance
Director

Attachment

EXHIBIT F
Circular No. A-46
Revised May 12, 1977

RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING

Purpose: This Exhibit provides standard classifications for recordkeeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities. These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program. They have been developed in response to needs expressed by both the executive branch and the Congress to provide for the collection and use of compatible, nonduplicated, exchangeable racial and ethnic data by Federal agencies.

Definitions: The basic racial and ethnic categories for Federal statistics and program administrative reporting are defined as follows:

1. *American Indian or Alaskan Native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. Code - 03; 05; 06.

2. *Asian or Pacific Islander.* A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. Code - 04.

3. *Black.* A person having origins in any of the Black racial groups of Africa. Code - 01.

4. *Hispanic.* A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. Code - 02.

5. *White.* A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. Code 07.

Utilization for Recordkeeping and Reporting: To provide flexibility, it is preferable to collect data on race and ethnicity separately. If separate race and ethnic categories are used, the minimum designations are:

a. Race:

— American Indian or Alaskan Native

— Asian or Pacific Islander

— Black

— White

b. Ethnicity:

— Hispanic origin

— Not of Hispanic origin

When race and ethnicity are collected separately, the number of white and Black persons who are Hispanic must be identifiable, and capable of being reported in that category.

If a combined format is used to collect racial and ethnic data, the minimum acceptable categories are:

American Indian or Alaskan Native

Asian or Pacific Islander

Black, not of Hispanic origin

Hispanic

White, not of Hispanic origin

The category which most closely reflects the individual's recognition in his community should be used for purposes

of reporting on persons who are of mixed racial and/or ethnic origins.

In no case should the provisions of this Exhibit be construed to limit the collection of data to the categories described above. However, any reporting required which uses more detail shall be organized in such a way that the additional categories can be aggregated into these basic racial/ethnic categories.

The minimum standard collection categories shall be utilized for reporting as follows:

Civil rights compliance reporting: The categories specified above will be used by all agencies in either the separate or combined format for civil rights compliance reporting and equal employment reporting for both the public and private sectors and for all levels of government. Any variation requiring less detailed data or data which cannot be aggregated into the basic categories will have to be specifically approved by the Statistical Policy Division of OMB for executive agencies. More detailed reporting which can be aggregated to the basic categories may be used at the agencies' discretion.

General program administrative and grant reporting: Whenever an agency subject to this Circular issues new or revised administrative reporting or recordkeeping requirements which include racial or ethnic data, the agency will use the race/ethnic categories described above. A variance can be specifically requested from the Statistical Policy Division of OMB, but such a variance will be granted only if the agency can demonstrate that it is not reasonable for the primary reporter to determine the racial or ethnic background in terms of the specified categories, and that such determination is not critical to the administration of the program in question, or if the specific program is directed to only one or a limited number of race/ethnic groups, e.g., Indian tribal activities.

Statistical reporting: The categories described in this Exhibit will be used as a minimum for federally sponsored statistical data collection where race and/or ethnicity is required, except when: the collection involves a sample of such size that the data on the smaller categories would be unreliable, or when the collection effort focuses on a specific racial or ethnic group. A repetitive survey shall be deemed to have an adequate sample size if the racial and ethnic data can be reliably aggregated on a biennial basis. Any other variation will have to be specifically authorized by OMB through the reports clearance process (see OMB Circular A-40). In those cases where the data collection is not subject to the reports clearance process, a direct request for a variance should be made to the Statistical Policy Division of OMB.

Effective date: The provisions of this Exhibit will be effective immediately for all *new* and *revised* recordkeeping or reporting requirements containing racial and/or ethnic information. All *existing* recordkeeping or reporting requirements shall be made consistent with this Exhibit at the time they are submitted for extension, or not later than January 1, 1980.

Presentation of Race/Ethnic Data:

1. Displays of racial and ethnic compliance and statistical data will use the category designations listed above. The designation "nonwhite" is not acceptable for use in the presentation of Federal Government data. It is not to be used in any publication of compliance or statistical data or in the text of any compliance or statistical report.

2. In cases where the above designations are considered inappropriate for presentation of statistical data on particular programs or for particular regional areas, the sponsoring agency may use:

a. The designations "Black and Other Races" or "All Other Races," as collective descriptions of minority races when the most summary distinction between the majority and minority races is appropriate;

b. The designation "White," "Black," and "All Other Races" when the distinction among the majority race, the principal minority race and other races is appropriate; or

c. The designation of a particular minority race or races, and the inclusion of "White" with "All Other Races," if such a collective description is appropriate.

3. In displaying detailed information which represents a combination of race and ethnicity, the description of the data being displayed must clearly indicate that both bases of classification are being use.

4. When the primary focus of a statistical report is on two or more specific identifiable groups in the population, one or more of which is racial or ethnic, it is acceptable to display data for each of the particular groups separately and to describe data relating to the remainder of the population by an appropriate collective description.

APPENDIX B

THE WHITE HOUSE
WASHINGTON

July 27, 1977

Jim King

MEMORANDUM FOR THE HEADS OF
DEPARTMENTS AND AGENCIES

FROM: PRESIDENTIAL PERSONNEL OFFICE

SUBJECT: Non-Career Personnel Job File

I. *Introduction*

At the President's direction, this office has established a program to monitor progress in non-career hiring in Executive departments.

Our goal is to provide the President with timely reports on the progress of hiring for non-career positions. The Presidential Personnel Office has developed an automated data file for non-career positions. The task of the departments and agencies will be to furnish use with information concerning non-career positions and certain biographical information concerning incumbents occupying these positions.

II. *Reporting Job and Incumbent Information*

A. *Positions Included:*

The following excepted positions should be included in each report: Non-Career Executive Assignment (NEA's), and Schedule C positions. Information should be reported for *all* authorized positions, *whether encumbered or vacant.*

B. *Reporting Timetable:*

An initial report should be submitted to the Presidential Personnel Office (Attn: Job File) by the close of business, Wednesday, August 3, 1977.

This report should include information on all current positions and incumbents. Therefore, a report should be completed every month and forwarded to this office by the 10th of the following month. The monthly report should include all changes since the previous report:

— New positions created or eliminated

— Vacancies filled

— New vacancies

SUBJECT: Non-Career Personnel Job File

C. *Reporting Format:*

Attached is a report form which should be used to report position and incumbent information. One copy of the form should be completed for each position reported, both vacant and encumbered. The top half of the form is for reporting information concerning the position; the bottom half is for reporting biographical information concerning incumbents.

1. *Job Information*

a. *City.* The city in which the job is located.

b. *State.* Two letter Postal Service state abbreviation. If not in US, use ZZ. See Attachment.

c. *Region.* Coded federal region of jurisdiction. Leave blank if not a regional job. *e.g.,*

FD01	Federal Region I
FD02	Federal Region II
etc.	

d. *Country.* As indicated. Blank if USA.

e. *Position.* Complete title for the position.

f. *Type.* Type of appointment: NEA, C

g. *Grade.* Salary grade of position according to the following schedule:

WOC	Without Compensation
NE	Grade Not Estalished
LVL#	Executive Level
GS##	General Schedule
GG##	Administrative Grades
WG##, WB## WS##	Blue Collar Wage Grades
FO##	Foreign Service Officer
FR##	Foreign Service Reserve Officer

SUBJECT: Non-Career Personnel Job File

h. *Salary.* Yearly, daily, or hourly salary.

i. *Pay basis.* Complete according to the following schedule:

I	Intermittent, When Actually Employed
PD	Per Diem
PH	Per Hour
GB	During Good Behavior
NT	Not to exceed

2. *Incumbent Information*

Complete this part of the form for each position for which there is an incumbent. Leave blank if the position is vacant.

a. *Name.* First and last.

b. *Date of appointment.* Date incumbent assumed office. Use six digit form—year, month, day e.g., June 30, 1977 = 770630.

c. *Date of initial appointment.* If the incumbent has been reappointed only, show the date of first appointment.

d. *Date vacated.* Date office vacated. Leave Blank if position encumbered.

e. *Race.* According to the following schedule:

A	Asian
B	Black
H	Hispanic
NA	Native American
W	White
O	Other

f. *Ethnic.* Background according to the following schedule:

SUBJECT: Non-Career Personnel Job File

10	Caucasian
15	German/Austrian
20	Scandinavian
25	Irish
30	Italian
35	Polish
40	French
45	Russian
50	Other East European
55	Middle Eastern
60	Spanish Speaking
65	Black
70	American Indian
80	Asian/Oriental
85	Other

g. *Sex.* M or F.

h. *YOB. Year of birth.* Indicate last two digits of year of birth, e.g., 1931 = 31.

i. *Domicile.* State of voting residence. Use two letter abbreviaion.

j. *Veteran.* Indicate status according to the following numerical codes. Otherwise, leave blank.

1	Veteran
2	Disabled Veteran
3	Viet Nam Veteran
4	Disabled Viet Nam Veteran

k. *Handicapped.* Indicate "Y" if handicapped, otherwise leave blank.

l. *Status.* Indicate career status of incumbent according to the following schedule:

S	Status in position
VP	Veteran's Preference
VP-S	Veteran's Preference with Status in position
CA	Career Ambassador
CM	Career Minister
C	Career
NC	Non career
M	Military incumbent

SUBJECT: Non-Career Personnel Job File

FSO	Foreign Service Officer
FSIO	Foreign Service Information Officer
FSRO	Foreign Service Reserve Officer
FSRU	Foreign Service Reserve Unlimited Officer
FSSS	Foreign Service Staff Officer

m. *Mailing address.* Street, City, State (two letter abbreviation) and zip code.

n. *RPhone.* Residence telephone, including area code.

o. *BPhone.* Business telephone.

p. *Background.* One letter code according to the following table:

A	Civil Service
B	Foreign Service Officer
C	Federal Legislative
D	Career Military
G	Business
H	Journalism
I	Foundations
J	Religion
N	Legal
P	Education/University-Teacher
R	State and Local Government
T	Labor

Attachment

PRESIDENTIAL PERSONNEL JOB FILE

City _____ State _____ Region _____ Country _____

Position Type _____

_____

Grade _____ Salary _____ Pay Basis ___

Name (First) _____ (Last) _____

Date Appointed _____ Date Initial Appt __ _____

Date Vacated _____ Race _____ Ethnic____

Sex _____ YOB _____ Domicile _____ Vet _____ Handicapped _____ Status _____

Street _____

City _____ State _____ Zip _____

RPHONE ___ ___ _____ BPHONE ___ ___ _____ Background _____

Remember to fill top half of form if job is vacant.

STATE

Print two letter abbreviation for State of residence as follows:

Alabama	AL	Montana	MT
Alaska	AK	Nebraska	NE
Arizona	AZ	Nevada	NV
Arkansas	AR	New Hampshire	NH
California	CA	New Jersey	NJ
Canal Zone	CZ	New Mexico	NM
Colorado	CO	New York	NY
Connecticut	CT	North Carolina	NC
Delaware	DE	North Dakota	ND
District of Columbia	DC	Ohio	OH
Florida	FL	Oklahoma	OK
Georgia	GA	Oregon	OR
Guam	GU	Pennsylvania	PA
Hawaii	HI	Puerto Rico	PR
Idaho	ID	Rhode Island	RI
Illinois	IL	South Carolina	SC
Indiana	IN	South Dakota	SK
Iowa	IA	Tennessee	TN
Kansas	KS	Texas	TX
Kentucky	KY	Utah	UT
Louisiana	LA	Vermont	VT
Maine	ME	Virginia	VA
Maryland	MD	Virgin Islands	VI
Massachusetts	MA	Washington	WA
Michigan	MI	West Virginia	WV
Minnesota	MN	Wisconsin	WI
Mississippi	MS	Wyoming	WY
Missouri	MO		

NOTE: If Foreign address is given, complete two blocks with the Code ZZ.

Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER, ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

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BRIAN F. WEBER, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION

INTEREST OF THE *AMICUS CURIAE**

The resolution of the issues in this case will have a dramatic impact on the operations of government contractors throughout the country. The Government Contract Employers

* Pursuant to Rule 42(2) of the Rules of this Court, written consents, of the Parties to the filing of this Brief have been obtained and have been lodged with the Clerk of the Court.

Association ("GCEA") therefore respectfully submits this brief *amicus curiae* in support of Respondent, Brian Weber in order to assist the Court in resolving the tension between the regulations promulgated under Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978) ("E.O. 11246"), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) ("Title VII").

The GCEA is a not-for-profit association of businesses and associations representing employers in the retailing, manufacturing and service industries who contract with the government. Employers represented by GCEA directly, or indirectly by membership in GCEA of their representative associations, aggregate total sales in excess of $50 billion per year. A substantial portion of this revenue is derived from contracts with the United States government. The employers represented by GCEA directly or indirectly, are subject to the affirmative action requirements of E.O. 11246 and the regulations thereunder. They also are bound by the Title VII prohibitions against discrimination in employment.

The regulations promulgated by the Department of Labor under E.O. 11246 require behavior by employers which is outlawed by the non-discrimination provisions of Title VII.

Employers who have to contend with these two conflicting government mandates are left in a quandry as to the legality of their actions and their potential liability for failure to comply with one or the other government mandates. The GCEA was formed to assist employers in resolving these tensions.

The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where necessary, challenging the correctness of regulations, orders and law designed to promote equal employment opportunity for all employees.

The GCEA represents a point of view of government contractors that is not being presented to the Court by any other employer association.[1] However, the members of GCEA will be directly affected by the outcome of the instant case.[2] The decision of the Fifth Circuit below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private actions by persons who may have been discriminated against because of this government mandated action.

As this case aptly demonstrates, while employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

> (i) The requirement that federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971), and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

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[1] Although the Equal Employment Advisory Council has filed a brief *amicus curiae* in this case, it expressly refused to take a position regarding the legality of the program at issue. Brief *Amicus Curiae* of the Equal Employment Advisory Council, page 8.

[2] Any change in the obligations of government contractors could have an adverse effect on their current affirmative action requirements. The GCEA thus urges that any change in these obligations, and any liability arising therefrom, be prospective only. *City of Los Angeles* v. *Manhart,* ___ U.S. ___, 46 U.S.L.W. 4347 (1978).

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 n. 19 (1973).

It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration that the reasons for a numerical imbalance in the work force is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters*, ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney*, 47 U.S.L.W. 3330, 18 FEP Cases 520 (1978).

The analysis and standards proposed by this *amicus* will assist the Court in reconciling the regulations of the Department of Labor with Title VII, and in providing guidance to employers concerning the appropriate scope of affirmative action.

QUESTION PRESENTED

WHETHER RACIAL QUOTAS CAN BE IMPOSED NOT TO REMEDY PAST DISCRIMINATION BY AN EMPLOYER, OR TO ASSIST IDENTIFIABLE VICTIMS OF PAST DISCRIMINATION, BUT RATHER TO ACHIEVE A DESIGNATED RATIO OF MINORITY EMPLOYEES PRESUMED TO HAVE BEEN VICTIMS OF SOCIETAL DISCRIMINATION.

ARGUMENT

I. The Voluntary Use Of Race To Allocate Positions In A Craft Training Program Violates Title VII.

A. Title VII By Its Terms Prohibits Racial Discrimination Against Any Person.

The relevant portions of Title VII involved in this case are Sections 703(a), (d) and (j) of the Act:

(a) It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

(d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d).

(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

42 U.S.C. § 2000e-2(j).

These provisions unequivocally prohibit the use of race as a determinant in making employment decisions. Yet it is

undisputed that the program of Petitioners Kaiser Aluminum & Chemical Corp. ("Kaiser") and United Steel Workers of America ("Union") not only classified employees according to race for entrance into the on-the-job craft training program, but it also required a rigid one white for one minority entrant into the program until the percentage of minority craft workers roughly approximated the percentage of minority population in the surrounding area of each plant.[3]

The action by Petitioners was not taken in order to remedy any past discrimination by Kaiser.[4] Nor was it taken to restore any identified victim of discrimination to his rightful place in the employment scheme.[5] Rather Kaiser and the union voluntarily instituted this program in order to increase the percentage of the black craftsmen, afford more job opportunities to blacks, avoid vexatious litigation by minority employees and satisfy the requirements of the OFCCP.[6] None of these reasons are sufficient to justify the resulting illegal discrimination against Brian Weber and the class he represents.

The legislative history of VII is replete with assurances that the Title is to apply to all persons regardless of race, religion, sex or national origin.[7] That the protections of the Act apply

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[3] *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 763 (E.D. La. 1976).

[4] 415 F. Supp. 761, 765; 563 F.2d 216, 224. Both courts below specifically found that Kaiser had not discriminated in the past at its Gramercy, Louisiana plant. This finding should not be disturbed "in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). The record is clear that no such error exists. The government had ample opportunity to dispute this finding in the courts below. It should not be permitted at this stage to dispute this finding through remand.

[5] *Cf. Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

[6] 415 F. Supp. at 765.

[7] See generally interpretive memorandum of Title VII of HR 7152 submitted jointly by Senators Clark and Case, floor managers, 110 Cong. Rec. 7212 (1964), and § 703(j) of the Act, 42 U.S.C. § 2000e-2(j).

equally to whites as well as blacks is beyond dispute.[8] Indeed the Court early recognized that ["d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

During the course of the debates in enacting Title VII, grave concerns were raised that the Act, as proposed, would require employers to disadvantage whites in order to comply with the Title.[9] This objection was met by proponents of the Act with the contention that no such treatment was intended. "[An employer] would not be obliged—*or indeed, permitted*—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[10] Despite these assurances, doubts as to the Act's intent persisted. Section 703(j) was inserted in the Act to alleviate these fears.

Senator Humphrey, one of the bill's drafters, commented on the purpose of § 703(j) as follows:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.[11]

The language and legislative history of the Act make one fundamental principle clear—discrimination in employment *against any person* on the basis of race, religion, sex or national

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[8] *See eg.* Remarks of Rep. Seller, 110 Cong. Rec. at 2579 (1964); Memorandum of Sen. Clark, 110 Cong. Rec. at 7218 (1964); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

[9] *See eg.* 110 Cong. Rec. 9881 (1964).

[10] 110 Cong. Rec. at 7213 (1964), (*emphasis supplied*).

[11] 110 Cong. Rec. at 12723 (1964).

origin will not be tolerated. By denying Brian Weber access to Kaiser's craft training program solely because of his race, Petitioners violated Title VII.

B. The Use Of Racial Classifications Cannot Be Justified As Responsive To Societal Discrimination When Its Effect Is To Deprive Identified White Employees Of Their Title VII Rights.

The purpose of Title VII is twofold: "to assure equality of employment opportunities, and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973) citing *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429 (1971). However, equality of employment can never be achieved by disadvantaging identifiable white employees in the name of remedying past societal wrongs. Where the disadvantage comes in the form of racial quotas, as in the present case, the deprivation is particularly invidious.

In every case where a court has imposed a racial quota it has been done in response to a finding of actual discrimination.[12] Even in cases such as these courts have been cautious to impose the remedy only where the factual circumstances warrant such relief.[13] The voluntary use of racial quotas has no judicial sanction.

In *Regents of the University of California* v. *Bakke,* ____ U.S. ____, 98 S. Ct. 2733 (1978), the Court found that under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et*

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[12] *See eg., United States* v. *International Union of Elevator Constructors Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *United States* v. *N. L. Industries, Inc.* 479 F.2d 354 (8th Cir. 1973).

[13] *Patterson* v. *American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976); *Chance* v. *Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); *Watkins* v. *United Steelworkers of America Local 2369,* 516 F.2d 41 (5th Cir. 1975).

seq., race can be considered as one factor in giving preferential treatment to minorities if the reason for the consideration is constitutionally justifiable. This case is inapposite in the present context for three reasons.

First, the ambiguity of legislative intent under Title VI which four members of the Court found sufficient to support preferential treatment of minorities to rectify past societal discrimination is not present under Title VII. On the contrary, both the language and legislative history of Title VII forbid preferential treatment for any racial group. Second, unlike *Bakke,* the present case presents no issue of state action. Rather this case involves action taken by purely private parties not subject to any constitutional proscription against discrimination. Thus the question presented is purely one of statutory interpretation. Finally the action taken by Kaiser and the Union was not limited to considering race as one factor in giving preferential treatment to minorities. Rather, race was the sole criterion for admission to the training program.

In the present case Petitioners attempt to avoid the clear nondiscrimination mandate of Title VII by asking the Court to read § 703(j) permissively. They argue that the language of § 703(j) can be read as permitting *voluntary* racial balance of work forces although such balance could not be *required* by the government. This argument was raised in the District Court and was properly rejected.

> After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in Sections 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many

> consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

415 F. Supp. at 766.

The fatal flaw of Petitioners' argument is that its recommended reading of § 703(j) would create a cause of action under §§ 703(a)-(d). If employers were allowed to impose racial quotas in order to racially balance their work forces both blacks and whites would be entitled to bring suit under §§ 703(a)-(d) based upon discrimination by race. Petitioners' reading thus would create an irreconcilable conflict within the statute.[14] This result cannot be tolerated.

Moreover, the fact that statutory language is written in permissive terms does not mean that Congress did not intend a mandatory reading. For example, similar permissive language in the venue provision of the National Banking Act was construed by the Court to require a mandatory reading. *Mercantile National Bank at Dallas* v. *Langdean,* 371 U.S. 555 (1963) (interpreting 12 U.S.C. § 94).

In *McDonald* v. *Santa Fe Trail Transportation Co., supra,* the case which created a cause of action for reverse discrimination, the Court held, *inter alia,* that § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981[15] applied to white persons

[14] Petitioners also contend that Congress' rejection of proposed amendments to extend the prohibitions of § 703(j) to E.O. 11246 is further evidence that voluntary balances of work forces are appropriate. Brief of Petitioner Kaiser at page 34. Not only does a negative inference by one House of Congress in itself deserve little if any weight, but also the views of a later Congress in interpreting an Act passed by an earlier Congress is not entitled to deference. It is the intent of the Congress that enacted § 703(j) which controls. See *International Brotherhood of Teamsters* v. *U.S.,* 437 U.S. 324 (1977).

[15] Title 42 U.S.C. § 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . "

upon the same standards as nonwhites. In *Santa Fe* the Court acknowledged that § 1981 was enacted predominately to assure civil rights to former Negro slaves and not with protecting the civil rights of white persons, and that by its terms the Act did not apply to whites. Nevertheless the language and legislative history of the Act disclosed that its protections were to apply to all persons equally.

Like § 1981, Title VII was enacted predominately to erradicate racial discrimination against minorities. Also like § 1981, the protections of Title VII apply equally to whites as well as nonwhites. Thus although § 703(j) does not by its *terms* outlaw racial balance in work forces, when read in context and in conjunction with the legislative history, such balancing is banned under Title VII. Any other reading would render senseless a carefully drafted plan by Congress to create equal employment opportunity for all persons.

The basic policy of Title VII focuses on "fairness to individuals rather than fairness to classes". *City of Los Angeles* v. *Manhart,* 46 U.S.L.W. 4347, 4349 (1978). Thus to deprive identified white employees of their Title VII rights in the name of remedying past societal discrimination (which by its very nature does not redress a specific wrong to a specific person) subverts the fundamental principles of equality which the Act was designed to promote.

C. The Regulations Promulgated Under Executive Order 11246 Contravene The Express Prohibition Against Employment Discrimination Of Title VII.

Among the reasons cited by Petitioners for instituting the quota system in issue was "satisfying the requirements of OFCC[p]."[16] 451 F. Supp. at 765. The "economic coercion"[17]

[16] This question was left open in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. at 280 n. 8.

[17] *Pan American World Airways* v. *Marshall,* 439 F. Supp. 487, 495 (S.D.N.Y. 1977).

exercised by OFCCP in demanding that employers racially balance their work forces to reflect the percentage of minority population in the available work pool is in direct conflict with § 703(j) of Title VII.

Executive Order 11246 was enacted as a vehicle to assure that government contractors (1) not illegally discriminate and (2) develop affirmative action plans that allow all persons to share equally in jobs created because of government contracts.[18] The Executive Order is not facially contradictory with Title VII. Rather, the regulations promulgated by the Department of Labor under the authority of the Order create the conflict. This is accomplished by two means. First, the OFCCP uses the Executive Order to redefine the term "discrimination" from its common meaning and from its meaning under Title VII. Second, OFCCP requires government contractors to maintain racial and sexual quotas in order to satisfy its perception of affirmative action. This action has created the dilemma which all federal contractors face and which this Court is asked today to resolve.

The OFCCP regulations require a federal contractor to make a written work force analysis and develop a written affirmative action compliance program for each establishment.[19] Failure to establish an affirmative action plan or any substantial deviation therefrom can result in a finding of nonresponsibility and the initiation of enforcement proceedings.[20] If the utilization analysis shows that a particular employer has "underutilizations"[21] of available minorities or women,

[18] Remarks of Sen. Saxbe, 110 Cong. Rec. at 1385 (1964).

[19] Revised Order Number 4, 41 C.F.R. § 60-2.11.

[20] 41 C.F.R. § 60-2.2(b). (See attached Appendix B p. A-12)

[21] Underutilization "merely means that there is a numerical disparity between availability and utilization". *In the Matter of Firestone Synthetic Rubber & Latex Company's Facility in Orange, Texas,* BNA Daily Labor Report, December 12, 1978, page F1 (attached hereto as Appendix D p. A-31).

(an "affected class"), it must develop "goals and timetables" to overcome the underutilization in the particular work group.[22]

The OFCCP maintains that the imposition of goals and timetables is not dependent upon any finding of past discrimination. Yet E.O. 11246 provides that sanctions can be imposed only for violation of one of the two mandates of the Order—failure to develop and maintain an affirmative action plan or discrimination on the basis of race, color, religion, sex or national origin.[23] By imposing sanctions for failure to correct an affected class problem, regardless of the reasons for its existence,[24] the OFCCP has redefined discrimination to mean the mere existence of a numerical disparity between utilization and availability. This standard is totally in conflict with that defined by the Court in *McDonnell Douglas Corp.* v. *Green, supra.*[25] Moreover, the Court has never held that statistics alone are sufficient to establish a finding of discrimination. Indeed the Court cautioned in *International Brotherhood of Teamsters* v. *U.S., supra,* that "statistics are not irrefutable; they may be rebutted. In short the usefulness depends on all of the surrounding facts and circumstances" 431 U.S. at ____. Yet the OFCCP, on the basis of numerical findings alone, makes a determination that an employer is in noncompliance and therefore subject to the sanction of debarment. Federal contractors cannot be required to meet a standard of culpability for discrimination which is lower than that under Title VII. Discrimination must have the same meaning for all equal employment laws and orders. (See opening line of "Policy Statement" of Equal Employment Opportunity Coordinating

[22] 41 C.F.R. §§ 60-2.10, 60-2.12.

[23] Section 202(6) and Section 209, Executive Order 11246, *supra.* (See attached Appendix A p. A-2, A-4).

[24] Section 60-2.1(b) provides in relevant part "an affected class problem must be remedied in order for a contractor to be considered in compliance." 41 C.F.R. § 60-2.1(b). (See Appendix B, p. A-11).

[25] See discussion on page 15 *infra.*

Council established as part of 1972 Amendments to Title VII and EO 11246 (Appendix C p. 30a, Brief for the United States and the EEOC.)

In enforcing its erroneous view of discrimination the OFCCP imposes quotas in the guise of "goals and timetables" to remedy any affected class problems. As found by the court of appeals below these goals and timetables are indistinguishable from quotas.[26] The transformation of goals and timetables into illegal quotas is accomplished by the direction given by the OFCCP in Technical Guidance Memo No. 1 on Revised Order No. 4.[27] This guidance memoranda in relevant part provides as follows:

> "For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in the place of percentage goals."

By requiring hiring rates keyed to the ultimate "goal", all flexibility is lost and replaced by the rigidity of a racial quota. For example, under Technical Guidance Memo No. 1 if a contractor set his ultimate goal at 40% minority representation, he would be required to fill four out of ten vacancies with minorities. If this racial quota was not followed the contractor would be deviating from his affirmative action plan and be in violation of the regulations (see 41 C.F.R. 60-2.2(b)) (Appendix B p. A-12). No more clear definition of a quota can be found.

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[26] 563 F.2d at 222. *See also,* Silberman, "The Road to Racial Quotas", Wall Street Journal, August 11, 1977, at 12, col. 4.

[27] The memo is attached as appendix C (A-22) hereto. That the OFCCP is still following this memo is evidenced by *In Re the Matter of Firestone, supra* (Appendix D p. A-26).

Thus, without any showing of actual discrimination, a federal contractor who fails to comply with the above OFCCP regulations faces the sanctions of the cancellation or termination of all federal contracts, the withholding of progress payments on a particular contract, or debarment from all future federal contracts prior to a hearing.[28] It is no wonder that federal contractors such as Kaiser feel under tremendous pressure to comply with OFCCP despite the contrary mandates of Title VII.

Employers receiving government contracts who resist pressures to implement numerical goals or quotas in order to comply with Title VII invite discrimination suits and will either have to bear the expense of defense or the stigma and expense of an admission of discrimination.[29] In many cases employers face a massive, if not insurmountable, burden to justify their selection practices if they are seen as barriers to employment of

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[28] 41 C.F.R. § 60-1.26; 41 C.F.R. § 60-2.2(b); 41 C.F.R. § 60-30. See *Crown Zellerback Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La. 1977); *Illinois Tool Works* v. *Marshall,* 17 FEP Cases 520 (N.D. Ill. 1978), as illustrative of the government's widespread practice of imposing the above sanctions prior to a hearing. (Also see *Pan American World Airways* v. *Marshall* Fn. 17 at p. 11 *supra,* and discussion of these practices in *Smetana* "Tools of the Private Practitioner in Dealing with Government Contract Compliance under Executive Order. 11246" (Appendix E p. A-36).

[29] The EEOC attempted to alleviate these consequences by issuance of affirmative action guidelines. However these guidelines cannot be accepted as a justification for reverse discrimination. First, the guidelines were issued on the very day that certiorari was granted in the instant case and thus are not a contemporaneous interpretation of the Act which should be afforded deferrence. Second, the thrust of the guidelines are inconsistent with § 706(g) of the Act which provides for affirmative action only as a remedy for intentional discrimination. Third, the interpretation of Title VII by the EEOC is not binding on any court of law. The EEOC Guidelines are not in issue in this case. As the EEOC is an active party litigant its views in this regard should be treated the same as *post hoc* rationalizations of counsel and should not be passed upon. See *NLRB* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965).

minorities and women even though there is no basis for questioning their good faith. Moreover, such reluctance subjects employers to sanctions under Executive Order 11246 including debarment from all future federal contracts.

The OFCCP's requirement that an employer establish goals and timetables without being afforded an opportunity to demonstrate that any imbalance existing in his work force is not the result of acts of discrimination is inconsistent with the Court's decisions in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____ U.S. ____, 98 S.Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330, 18 F.E.P. Cases 520 (1978).

In *McDonnell Douglas, supra,* the Court established the order and allocation of proof under Title VII. This procedure requires a three step analysis. First, the plaintiff must carry the initial burden of establishing a *prima facie* case of racial discrimination. The burden then shifts to the employer to articulate some nondiscriminatory reason for his action. The plaintiff is then afforded the opportunity to show that the proffered reason is a mere pretext to cover the discrimination.

These standards stand in stark contrast to the OFCCP's unilateral determination and irrefutable presumption of discrimination by the mere existence of an affected class. The employer is given no opportunity to "articulate a nondiscriminatory reason" for the underutilization. Under the OFCCP's practice the three step burden of proof under Title VII is reduced to a single determination of guilt on the basis of statistics alone.

The OFCCP regulations cannot be reconciled with Title VII. Section 703(j) specifically states that no employer shall be required to maintain a racial balance in his work force. The OFCCP regulations mandate such a balance. The conflict is clear. In such cases the regulations must fall. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

II. Meaningful Affirmative Action Can Be Accomplished Within The Bounds Of Title VII.

As discussed above, E.O. 11246 is not facially contradictory with Title VII. Meaningful affirmative action can be achieved under E.O. 11246 without running afoul of Title VII.

The fundamental principle of affirmative action is preparing minorities and women for entrance into the work force on an equal footing with white males. This calls for increased emphasis on training and recruitment. However, in order to remain within the bounds of Title VII recruitment and training must be done in a nondiscriminatory manner.

Employers should be required to actively solicit minorities and women to fill job vacancies. They should direct special efforts to convince minorities and women that they mean what they say about equal employment opportunity. This could involve holding special workshops to acquaint minorities and women with the opportunities available at a particular workplace, and directing job advertising to areas where it is known the message will reach minorities and women. Training should also be supplied to make all employers ready to assume the more complex and higher rewarding job positions.

The flaw of the Kaiser training program is that it set fixed racial quotas for entrance thereto. This Title VII prohibits. This infirmity can be remedied however, by providing a pool of qualified candidates selected in the manner set forth immediately above, for entry into the training program on a nondiscriminatory basis. This process can be achieved despite the provisions of Section 703(h).

Section 703(h) provides that benefits afforded employees because of a bona fide seniority system will not violate Title VII so long as such benefits are not the result of an intent to unlawfully discriminate. However seniority rights must be capable of accomodation in order to accomplish the social policy of assuring that all persons are made ready to assume full

employment, promotion, and training opportunities. Because training programs would be open to all persons without regard to race, no cause of action would accrue under Title VII for those not admitted because of insufficient places in a training program. The difficult line between *"affirmative action"* required of Government Contractors, which we suggest includes making a special effort to attract minorities and women, and *"reverse discrimination"*, as well as accommodating *"seniority"*, should be drawn at the training program level in order to increase the pool of qualified candidates for non-discriminatory selection.

If an employer has done all that he can within the bounds of Title VII to recruit and train minorities and women, he has satisfied the requirements of E.O. 11246 to implement affirmative action, the OFCCP regulations to the contrary notwithstanding. Any action beyond this which violates the rights of majority employees is forbidden by the Act and E.O. 11246. If Congress desires a different result it is up to it to legislate. As the law currently exists the action by Petitioners violates Title VII.

Until the issue of the appropriate scope of affirmative action is resolved, employers should not be subjected to liability for suits alleging "reverse" discrimination when the action of the employer was taken in good faith reliance upon the regulations of the OFCCP. The application of prospective relief in this area is appropriate under the "equitable nature of Title VII remedies". *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4352 (1978). In *Manhart* the Court refused to grant retroactive relief in a case of first impression challenging pension fund contribution differentials based upon sex. Among the reasons for denying retroactive relief was the dilemma faced by an employer where "he is damned in the discrimination context no matter what he does" 46 U.S.L.W. at 4352 n. 38. The case before the Court today is also one of first impression. Resolving the conflicts created by Title VII and E.O. 11246 is a formidable task—one beyond the capabilities of government

contractors. Like the employees who attempted to reconcile the sexual differential contributions issue in *Manhart*, government contractors should not be penalized for being unable to predict the development of Title VII law by having any relief granted be retroactive.

CONCLUSION

For the reasons stated herein, GCEA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed and that the standards proposed by this *Amicus* be adopted as a guideline for the appropriate scope of affirmative action.

Respectfully submitted,

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February, 1979

APPENDIX A

E.O. 11246 on Nondiscrimination Under Federal Contracts

Text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967. Amended Part I, effective November 12, 1967, was superseded by Executive Order 11478 (LRX 2311). Part II was amended to add sex as prohibited basis of discrimination, effective October 13, 1968.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

ED. NOTE: Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC. (See LRX 2311.)

PART II—Nondiscrimination in Employment by Government Contractors and Subcontractors

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secre-

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tary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of

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the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D — SANCTIONS AND PENALTIES

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate

proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E — CERTIFICATES OF MERIT

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel train-

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ing, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III — Nondiscrimination Provisions in Federally Assisted Construction Contracts

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303 (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each

administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV — Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

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Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

APPENDIX B

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

NOTE: The President, by Executive Order 11246 (30 FR 12319), abolished the President's Committee on Equal Employment Opportunity and delegated the functions of the abolished Committee to the Secretary of Labor. By order of the Secretary of Labor, 30 FR 13441, Oct. 22, 1965, all rules, regulations, orders, instructions, and other directives, issued by the abolished Committee, not inconsistent with E.O. 11246 remain in effect for the present as those of the Secretary of Labor. All references in this chapter to "Committee", "Chairman", "Vice-Chairman", and "Executive Vice-Chairman" shall mean the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor, and all references to "a panel of the Committee" shall mean an appropriate panel of three appointed by the Director.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

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AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCE: 36 FR 23152, Dec. 4, 1971, unless otherwise noted.

Subpart A—General

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[42 FR 3461, Jan. 18, 1977]

§ 60-2.2 Agency action.

(a)(1) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor-bidder nonresponsible and so notify the contractor, the Director, and the compliance agency unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Director may require the compliance agency to develop the investigation or compliance review further or to conduct additional conciliation: *Provided,* That during any preaward conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further,* That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause, the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26. Such request for initiation of enforcement proceedings shall be sent to the Director no later than the date of issuance of the second nonresponsibility determination.

(c) (1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, the compliance agency representative or the representative of the Office of Federal Contract Compliance Programs, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance Programs of such fact. Whenever administrative enforcement is contemplated, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation or opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by

department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974; 39 FR 25654, July 12, 1974]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preference for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail his reason for a lack of a goal.

(l) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

[36 FR 23152, Dec. 4, 1971, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publica-

tions both minority and nominority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

Subpart D—Miscellaneous

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 published in the FEDERAL REGISTER on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

APPENDIX C

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance
WASHINGTON, D.C. 20210

In Reply Refer To: 4228-3

MEMORANDUM

TO: ALL CONTRACT COMPLIANCE OFFICERS

FROM: PHILIP J. DAVIS
Director

SUBJECT: Technical Guidance Memo No. 1 on Revised Order No. 4

The purpose of this memo is to give specific guidance on the proper interpretation on certain selected issues that have been or continue to be raised regarding Revised Order 4. Agencies are expected to implement these interpretations when reviewing affirmative action programs. Further guidance memos will be issued and serially numbered for your retention.

Each affirmative action program must contain an analysis that satisfies each of the following requirements:

(1) Workforce analysis which is defined as a listing of each job classification as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. For each job classification, the total number of male and female incumbents, and the total number of

male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job classification should be given. All job classifications, including all managerial job classifications, must be listed.

(2) Identification of Job Groups. After the workforce analysis is presented, job classifications may be grouped for the purpose of further analysis. Job groups should be composed of one or more jobs having similar content, wage rates and opportunities. Jobs with clearly different utilization patterns should not be grouped together (e.g., grouping predominantly male clerical jobs with predominantly female clerical jobs should be avoided). Job groups should relate to the data on availability. When data on detailed skills is available more detailed job groups can be used. If promotion through progression lines is rigid, and hiring above entry level is the rare exception, the subsequent availability analysis should be conducted on either entry level positions, or based upon skill requirements for those positions which the majority of employees could be expected to reach within five years or less after employment, and these jobs should be identified as job groups.

(3) Availability Analysis. Minority and female availability must be separately analyzed for each job group. The affirmative action program should include the specific percentages of minority persons (stated separately for Blacks, Spanish Surnamed Americans, American Indians and Orientals) and minority and non-minority women determined to be available in the applicable labor area for each job group.

A separate analysis must be prepared for each job group.

An exception may be made for production workers if it is concluded that utilization requirements will be similar for all units in production activities. A separate analysis will be required for maintenance employees, and likely individual analyses will be needed for individual crafts.

Analysis should be based upon local state employment security agencies' *Manpower Information for Affirmative Action Programs* data which is now available in most localities. The specific figures shown in Tables I, II, and III in those releases can be used in the analysis of population, workforce, unemployment, skill availability. Current occupations of employed persons indicated in Table III should at no time be considered the only basis for utilization, but must be expanded by evaluation of opportunities through training and recruitment.

(4) Underutilization Analysis. Whenever the percentage in a job or group of jobs of total minorities, or of any minority group exceeding 2% or more of the labor area, or of women is lower than the percentage of such persons available in that job category within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that category.

Some agencies have interpreted required goals too narrowly to mean only an annual goal. Where underutilization exists and wherever numbers or percentages are relevant in developing corrective action, each program must contain goals and timetables which satisfy each of the following requirements:

(1) A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in the applicable labor market.

A single goal for minorities is acceptable, unless, through the company's evaluation it is determined that one minority is underutilized in a substantially disparate manner, in which case separate goals and timetables for such minority groups may be required individually, and it may further be required, where appropriate, that separate goals be established within the minority groups by sex. (See Order 4, 60-2.12(k).)

(2) For each job category in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(3) For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals.

(4) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contact and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

APPENDIX D

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
FIRESTONE SYNTHETIC RUBBER AND LATEX COMPANY'S FACILITY IN ORANGE, TEXAS	:	Case No. 78-OFCC-13

LOUIS GEORGE FERRAND, JR., ESQUIRE
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For the Government

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For Firestone

Before: BURTON S. STERNBURG
Administrative Law Judge

ADVISORY DECISION

Statement of the Case

This is a proceeding instituted under the provisions of Executive Order 11246, as amended, 3 CFR 339 and the applicable regulations issued thereunder, 41 CFR Chapter 60 et seq.

On August 29, 1978, Weldon J. Rougeau, Director of the Office of Federal Contract Compliance Programs (OFCCP) issued a Notice of Hearing wherein he directed that a hearing be held for purposes of taking oral argument and accepting affidavits with respect to two issues involved in a compliance review of the Affirmative Action Program for Firestone Synthetic Latex and Rubber Company's facility in Orange, Texas. The issues were described in the Notice as follows:

(1) assuming no dispute as to availability under 41 CFR 60-2.11(b)(1)(i) - (viii) [or, as appropriate 2.11(b)(2)(i)-(vii)], when must underutilization be declared under 41 CFR 60.211(b)?

(2) if underutilization is declared, when must goals be established under 41 CFR 60-2.12?

By a letter dated September 15, 1978, in response to Firestone's third request for a "substantial question of law or fact" hearing pursuant to 41 CFR 60-2.2(b) of the regulations, the Director of OFCCP gave Firestone permission to brief a third issue, i.e. "whether the Constitution prohibits the Federal Government from imposing goals on its contractors in the absence of a finding of discrimination."

On October 31, 1978, following the dissolution of a temporary restraining order issued by the U.S. District Court for the Eastern District of Texas, Beaumont Division, a hearing was held in the captioned matter in Washington, D.C. In accordance with the provisions of the notice of hearing, the parties were afforded thirty minute arguments and the opportunity to submit briefs and affidavits in support of their respective positions.

Subsequently on November 3, 1978, after the close of the hearing, the Director of OFCCP, in an apparent attempt to settle a dispute which arose at the hearing concerning the type of decision to be rendered, directed a letter of clarification to the undersigned with copies to all parties. The letter reads in pertinent part as follows:

> ... the purpose of this preliminary informational and advisory hearing currently pending before you is to assist me in determining whether to grant or deny the substantial issue request. In that regard, your findings concerning the two issues enumerated in my August 29, 1978, Notice of Hearing are to be directed towards determining whether Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12. Such review includes whether Firestone was aware of the requirements prior to entering into current Government contracts. You are not, however, to attempt to resolve the argument by ultimately recommending whether Firestone's or the Government's interpretations, in the abstract, are correct because this is not a 41 CFR 60-2.2(b) substantial issues hearing.

Following the issuance of the aforementioned letter, both parties declined the opportunity for further oral argument and opted instead to submit briefs and affidavits in support of their respective positions.

FINDINGS OF FACT 1/

Firestone Synthetic Rubber and Latex Company (hereinafter "Firestone") is a Government contractor subject to the requirements of Executive Order 11246, as amended, and the implementing regulations issued pursuant thereto at 41 CFR Chapter 60. (See p. 1 of Memorandum in Support of Motion for Consideration of Additional Issues, for Allowance of Discovery, and for Continuance filed by Firestone in this Court on October 23, 1978).

On November 19, 1976, Firestone entered into Contract No. DAA EO 776 C3561 with the United States Army in the amount of $1,760,226. (See paragraph 3 of the October 2, 1978, Affidavit of Katherine A. Baldwin, hereinafter "Baldwin Affidavit No. 1," filed with the Brief of the Office of the Solicitor in this Court on October 2, 1978).

Firestone, at all times material to this dispute, has employed more than 50 persons at its Orange, Texas facility. (See p. 1 of Attachment to Appendix B of Baldwin Affidavit No. 1).

Prior to November 1977, in conducting utilization analyses for the Affirmative Action Program (AAP) at its Orange, Texas facility, Firestone declared underutilization in accordance with the Secretary's regulation at 41 CFR 60-2.11(b) and the Director of OFCCP's standard, i.e., whenever the availability percentages for women or minorities in a given job group exceeded Firestone's actual utilization of such persons. Whenever underutilization for minorities or women exceeded half of a person for a given job group, Firestone set goals in accordance with the Secretary's regulation at 41 CFR 60-2.12. (See November 17, 1978 affidavit of Katherine A. Baldwin, filed with this Court November 20, 1978, hereinafter "Baldwin Affidavit No. 2").

On November 8-10, 1977, the Department of Energy conducted an on-site compliance review, pursuant to 41 CFR 60-1.20(c), of Firestone's Orange, Texas facility. During the review, DOE's compliance officer, Mr. Cordova, informed Firestone

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1/ There is no dispute with respect to the facts which are based upon the admissions of the parties and the affidavits of Katherine Baldwin and attachments thereto.

officials that the 1977 and 1978 Affirmative Action Programs for its Orange facility failed to meet the requirements of Executive Order 11246, as amended, and the regulations promulgated thereunder, because of inadequacies in Firestone's utilization analysis required by 41 CFR 60-2.11. At that time, Firestone agreed to revise its utilization analysis and subsequently, by letters dated November 22, 1977, and December 15, 1977, submitted a revised utilization analysis. (See Attachments 1 and 2 to Appendix A of Baldwin Affidavit No. 1).

On January 30, 1978, Firestone submitted its revised 1978 AAP, including goals and timetables for job groups for which Firestone had declared underutilization. However, Firestone did not declare underutilization or set goals whenever the availability of women or minorities exceeded Firestone's actual utilization of such persons in a given job group but rather, it declared underutilization by using the standard deviation method of statistical significance at the 5% level.

On February 2, 1978, Mr. Cordova, having reviewed the revised 1978 AAP, advised Firestone by letter that the AAP did not meet the requirements of 41 CFR Part 60-2. The "AAP Review Findings," which were attached to the February 2, 1978 letter, identified Firestone's job group analysis as one of two deficient areas. The utilization analysis was found unacceptable because underutilization was declared by Firestone only in those situations where the difference between the "expected number" and the "observed number" of minorities or women was statistically significant at the 5% level. (See Appendix B of Baldwin Affidavit No. 1).

In the "AAP Review Findings" attached to the February 2, 1978 letter to Firestone, Mr. Cordova set forth the OFCCP standard for determining the existence of underutilization. Firestone was advised to use the underutilization standard prescribed by OFCCP, i.e., to revise its AAP to "specifically state that underutilization exists for every job group where the percentage of [minorities and women] employed in a job group is less than the percentage of persons available in that job group." (See p. 4 of Appendix B of Baldwin Affidavit No. 1).

On February 16, 1978, Firestone and Department of Energy representatives met to discuss Mr. Cordova's "AAP Review Findings" of February 2, 1978. Although Firestone agreed to submit a 1978 AAP with supplemental revisions, it did not agree to declare underutilization for every job group where the percentage of minorities and women employed was less than their availability. (See p. 4 of the Brief of the United

States Department of Labor, filed October 2, 1978.)

On February 27, 1978, Firestone requested a substantial issues determination and a hearing from the Director of OFCCP, Weldon J. Rougeau, pursuant to 41 CFR 60-2.2(b). Firestone, in its letter to the Director, explained that it had not declared underutilization in the several job groups at its Orange, Texas facility where the disparity between availability and current utilization was not significant at the 5% level. (See Appendix A of Baldwin Affidavit No. 1.)

On May 15, 1978, the Director of OFCCP denied Firestone's request for a substantial issues determination, citing Firestone's failure to follow OFCCP's interpretation of 41 CFR 60-2.11(b) in conducting a utilization analysis. The Director granted Firestone thirty (30) days in which to complete a utilization analysis which complied with the regulations. He also expressed his willingness to consider further evidence, if after conducting the proper utilization analysis, Firestone continued to dispute DOE's requirements with respect to utilization analyses. (See Appendix C of Baldwin Affidavit No. 1.)

In his May 15, 1978, letter denying Firestone's substantial issues request, the Director explained to Firestone that "underutilization" as used in 41 CFR 60-2.11(b), "merely means that there is a numerical disparity between availability and utilization. If such a disparity exists, the contractor is required under 41 CFR 60-2.12 to construct goals and timetables, regardless of whether or not it has ever discriminated in employment." (See Appendix C of Baldwin Affidavit No. 1.) Two examples attesting to OFCCP's position on underutilization were cited, the relevant portions excerpted and copies enclosed for Firestone's information. The first cited example, "Technical Guidance Memo No. 1 on Revised Order No. 4," was issued to "All Contract Compliance Officers" by the Director of OFCCP on February 22, 1974. The second example cited was a November 13, 1974, letter explaining underutilization from Under Secretary of Labor Schubert to Frank Carlucci, Under Secretary of the Department of Health, Education and Welfare. (See Attachments 1 and 2 of Appendix C of Baldwin Affidavit No. 1.)

On June 29, 1978, DOE representatives met with Firestone to discuss the remaining unresolved issues regarding the revised 1978 AAP for the Orange, Texas, facility. At the meeting, Firestone was informed that on the issue of underutilization, OFCCP would not vary from the underutilization standard expressed by the Director of the OFCCP in "Technical Guidance Memo No. 1 on Revised Order No. 4," the letter of November 13, 1974 from Mr. Schubert to HEW, and Mr. Rougeau's

May 15, 1978 letter. (See Appendix D of Baldwin Affidavit No. 1.)

On July 3, 1978, Firestone again requested a determination from Mr. Rougeau that a substantial question of law existed with respect to the proper standard of underutilization. (See Appendix D of Baldwin Affidavit No. 1.)

On August 15, 1978, DOE issued a notice to Firestone prusuant to 41 CFR 60-1.28, giving it 30 days to show cause why enforcement proceedings under the Executive Order should not be instituted. Among the deficiencies listed was the continued failure of Firestone to identify underutilization in its 1978 revised AAP for every job group where the percentage of minorities or women employed in the job group was less than the percentage available for that group. Examples of job groups in which Firestone improperly failed to identify underutilization were cited, and in recommending corrective action, the findings provided sample calculations how underutilization should be determined in accordance with the OFCCP standard. The revised 1978 AAP minority and female goals for the Orange, Texas facility were also found unacceptable. As corrective action, Firestone was told to establish annual numerical and percentage goals for each underutilized job group. (See pp. 2-3, 5 of enclosure to Appendix E to Baldwin Affidavit No. 1.)

DISCUSSION AND CONCLUSIONS

Firestone takes the position that substantial factual and legal questions exist with respect to the manner and method utilized by the Director of the OFCCP in determining underutilization. In support of this position Firestone points out that "availability data" is not predicated on any particular scientific approach but rather on a negotiated agreement between representatives of the contractors involved and OFCCP. In view of the unreliability of such "availability data" Firestone argues that it is not reasonable to declare "underutilization" when there is a disparity between "availability data" with respect to minorities or women and the presence of such persons actually on the contractors payroll. Accordinging to Firestone a more reasonable approach would be to declare "underutilization" only when the difference between availability of minorities or women and their current employment rate is statistically significant at the "5% level of significance." In support of its position in this regard, Firestone cites the decision of the Supreme Court in Hazelwood School District v. United States, 97 S.Ct. 2736(1977). Firestone further argues, that irrespective of what test is used to determine underutilization, in the absence of a finding of discrimination, the imposition

of goals and timetables to rectify any disparity between availability and employment is unconstitutional. In this latter respect, Firestone relies in the main on the courts decisions in Weber v. Kaiser Aluminum and Chemical Corporation 563 F.2d 216 (5th Cir. 1977), cert. pending, U.S.L.W. 3168 (1978); Regents of the University of California v. Bakke, 98 S.Ct. 2733.

The Government on the other hand takes the position that there are no substantial questions of fact or law in that (1) Firestone was or should have been aware of the consistent position of OFCCP with respect to when underutilization is to be declared; (2) the declaration of underutilization when there is a difference of one-half of one person between availability and employment is not unreasonable since it comports with the intentions of the Executive Order; (3) the Executive Order is not controlled by Title VII and therefore it need not comport with the "5% level of significance" utilized therein for purposes of establishing discrimination; and (4) the establishment of flexible goals and timetables, absent a finding of discrimination, is not unconstitutional.

As more fully set forth in the Director's November 3, 1978, letter of clarification, my function in the instant proceeding is to render an advisory opinion with respect to whether or not Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals and timetables in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12.

The facts, which are not in dispute, indicate that Firestone was at all times aware of the requirements of the Order, the regulations and the OFCCP's interpretations and application of same. In fact for the first few years of the current contract Firestone did adhere to and follow the position currently urged by OFCCP. Accordingly, there does not appear to be any substantial issue of fact warranting a full factual hearing under the regulations.

With respect to whether or not the method utilized by OFCCP in determining underutilization is "reasonable," Firestone relies in the main on various court cases involving Title VII of the 1964 Civil Rights Act, as amended.

Firestone admits, and I so find, that the Executive Order has the force and effect of law. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, cert. denied, 404 U.S. 84. (See also cases cited on page 10 of the Government's pre-hearing brief.) In these circumstances and considering the legislative history of Title VII, particularly the 1972 debates thereon, it is clear that there was

no intent to limit the Executive Order and make it subordinate to, or controlled by, Title VII. The debates, etc., indicate that enforcement of the Executive Order was to be separate and apart from Title VII and that the Order was to be the vehicle for insuring that Government contractors would develop affirmative action programs that would allow for all citizens to share equally in the jobs generated by Government contracts. (See 118 Congressional Record 1385, Remarks of Senator Saxbe.)

Inasmuch as attempts to merge the Executive Order and Title VII were defeated during the 1972 debates it follows that the tests applied in determining discrimination under Title VII are not controlling in determining underutilization under the Executive Order. Accordingly, the mere fact that the 5% standard of significance utilized in Title VII cases for purposes of establishing prima-facie cases of discrimination has received court approval does not make such standard of underutilization a more reasonable one than the discrepancy of 1/2 of one person utilized by OFCCP in declaring underutilization. This is particularly true in view of the purposes of the respective pieces of legislation. Thus, Title VII is designed to prevent and remedy discrimination, while the Executive Order is designed to foster job opportunities for all people in proportion to their availability irrespective of a finding of discrimination. This is a significant distinction. In view of the foregoing and considering the different objectives of the respective pieces of legislation, it does not appear that Firestone's argument relative to the reasonableness of the OFCCP's standard for declaring underutilization warrants the substantial issues hearing urged by Firestone. 2/

Lastly, with regard to the constitutionality or legality of the goals and timetables approach, as noted supra, Firestone takes the position that such goals and timetables are indeed quotas and, absent a showing of discrimination, are unconstitutional. In support of its position in this latter respect, Firestone cites Weber v. Kaiser Aluminum and Chemical Corporation and Regents of the University of California v. Bakke, supra, wherein the courts have indicated that

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2/ In reaching this conclusion, I have not ignored the alleged unscientific method utilized in arriving at the availability figures. However, inasmuch as such figure is a product of negotiation between the parties and not an arbitrary determination by OFCCP, I fail to see why Firestone should be allowed a 5% deviation from such figure. Had Firestone disagreed with the availability figure, then a substantial issue determination might well have been in order at that time.

establishment of racial quotas in the absence of a finding of discrimination are unconstitutional. The Government however, would distinquish those cases which arose under Title VII on the ground that the affirmative action programs arising under the Executive Order do not establish "quotas" but rather flexible goals. According to the Government, "Where good faith efforts have been made, a contractor may not be sanctioned for its failure to fully utilize minorities or women."

A reading of the regulations, particularly Section 60-2.12, supports the Government's position that the goals are flexible. Thus, Section 60-2.12(e) states that

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

Since the above cited regulation specifically make the "goal" something less than a "quota" it would appear that affirmative action plans formulated under the Executive Order without a prior finding of discrimination are not unconstitutional. Further support for such conclusion is found in the regulations as whole. Thus the regulations make it clear that the goals should be significant, measurable, attainable, specific for planned results with timetables for completion. The regulations caution that they are not intended to, and should not, be used to discriminate against any applicant or employee because of color, religion, sex or natural origin.

In view of the foregoing considerations, it does not appear that the goals and timetables approach is designed to reach the level of a quota. An affirmative action plan which rises to such level would of course be contrary to the regulations and, upon the basis of the court cases cited by Firestone, unconstitutional.

On the other hand, it is difficult to imagine how a contractor could reach the goals set forth in an affirmative action plan, all things being equal, without according some preference in hire to minorities and women. According such preferences to minorities and women narrows and to some extent destroys the distinction between flexible goals and quotas.

Inasmuch as the Bakke and Kaiser Aluminum cases, supra, as well as the Government's petition for certiorari in Kaiser Aluminum 3/ indicate that the establishment of quotas and/or preferences absent a finding of discrimination may be illegal, it appears that a substantial question of law does exist with respect to whether the imposition of goals and timetables under Executive Order 11246, absent a finding of discrimination, conflicts with the Constitution and Title VII.

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 8, 1978
Washington, D.C.

3/ In the petition the Government states: "Bakke teaches that the legality of an affirmative action program may turn on the presence of governmental findings of discrimination by the employer and the degree of governmental participation in developing the affirmative action plan."

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APPENDIX E

THE TOOLS OF THE PRIVATE PRACTITIONER IN DEALING WITH GOVERNMENT CONTRACT COMPLIANCE UNDER EXECUTIVE ORDER 11246*

GERARD C. SMETANA†

I. INTRODUCTION

This morning I wish to discuss some of the current and more crucial problems that face the lawyer in dealing with the Equal Employment Opportunity requirements imposed upon government contractors by Executive Order 11246. As more fully discussed by previous speakers, the Executive Order imposes essentially three kinds of obligations upon government contractors.

1. That he not engage in practices which discriminate on the basis of race, religion, color, national origin, or sex;

2. that he develop an affirmative action program which will promote equal employment opportunity, if he employs 50 or more employees, and has a covered contract of $50,000 or more; and

3. that he comply with the reporting provisions stipulated by the rules and regulations of the EEOC.

Although not within the scope of my presentation today, every attorney involved in this area should be aware that recent statutes have been enacted imposing similar types of requirements on government contractors and subcontractors with respect to Vietnam-era veterans[1] and the handicapped.[2]

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[1]Section 2012 of the Vietnam-era Veterans Readjustment Act; Section 503 of the Veterans Employment Act of 1972.

[2]Section 503 of the Vocational Rehabilitation Act of 1973.

Also, some states require companies who contract with the state to meet the same or similar requirements relating to the employment of disadvantaged persons. However, this morning I am from necessity limiting the scope of my remarks to those problems arising under Executive Order 11246, which regulates the equal employment activities of federal government contractors or their subcontractors.

The practitioner may approach these problems with somewhat more confidence or at least sense of perspective if he is aware of the legal authority and source for the foregoing requirements of Executive Order 11246. Thus, the authority of the President to issue executive orders is not inherent in the office, but must find its source either in the Constitution or a specific Act of Congress. *Youngstown Steel and Tube Co. v. Sawyer,* 343 U.S. 579, 635-638 (1952). Those courts of appeal that have dealt with the problem have held that Executive Order 11246 is implicitly authorized by the Federal Procurement Statutes.[3] *Contractors Association of Eastern Pennsylvania v. Secretary of Labor et al.,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971); *Farkas v. Texas Instrument Co.,* 375 F.2d 629 (5th Cir., 1966), *cert. denied,* 389 U.S. 977 (1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3, 8-10 (3rd Cir., 1964). Although the Supreme Court has not squarely addressed the propriety of Executive Order 11246, the most cogent rationale for upholding the Executive Order was expressed in *Contractors Association of Eastern Pennsylvania* by the Third Circuit. There it was held that the Federal Procurement Statutes implicitly authorized the President to take reasonable measures to insure the government contracts were not premised upon inflated labor costs resulting from the exclusion from the labor pool of available minority work force. While asserting that the Executive could not by fiat impose his notion of desirable social legislation, the court believed the President empowered to protect the federal government's legitimate interest in assuring the "largest possible pool of qualified manpower to be available for the accomplishment of its projects" (*supra,* at 171). The question is relevant here not only because some may consider it still open for litigation, but more pertinently, because the Third Circuit's rationale implies some limitations on the agencies implementing and construing Executive Order 11246. Thus, for instance, as I will discuss later, the government's authority to obtain back pay from government contractors for employees who were allegedly discriminated against, is doubtful if the government's only legitimate concern is to prospectively assure the availability of a broad-based labor force by which the contracting would be performed economically and efficiently. Back pay is a remedy which operates retroactively and not prospectively.

Whatever your views concerning whether Executive Order 11246 is validly authorized, in a great number of cases you will most likely need to

[3] 40 U.S.C. § 486(a); 40 U.S.C. § 471 *et seq.* and 50 U.S.C. App. § 2062 *et seq.*

proceed on the basis that it is valid. Therefore, you will be concerned with the more pragmatic problems of applying and construing the Executive Order as written. These problems fall within two categories: those of preventive law, that is, counseling your client on compliance and the second, corrective law, which entails representing the client in compliance proceedings initiated by one of the government's compliance agencies. Those will be the two main topics of my remarks.

II. PREVENTIVE LAW—COUNSELING THE CLIENT ON COMPLIANCE WITH EXECUTIVE ORDER 11246

A. *The Basic Tools and the Threshold Problem of Who Is a Covered Government Contractor or Subcontractor*

Ideally, of course, the practitioner will have the opportunity of counseling his client with respect to structuring a compliance program and avoiding those problems which may lead to the threat of cancellation of the government contract or debarment of the contractor from future contracts with the government. The basic tools of the practitioner in this instance are not only the Executive Order itself (found at 30 FR, 12319) but the rules and regulations of the Office of Federal Contract Compliance, 41 CFR 60.1 *et seq.*, the Proposed Affected Class Guidelines, which, although not officially promulgated, are in fact being followed by the government agencies (*Federal Register,* March 26, 1975), and also as a helpful guide to OFCC's views and procedures, the Compliance Manual of the OFCC (Daily Labor Reporter No. 134, July 11, 1975).

Also, a word about the governmental agencies involved in the enforcement of the Executive Order. While the Office of Federal Contract Compliance has supervisory authority, you will find yourself dealing with one of the contracting governmental agencies such as the Department of Defense, the GSA, or the Department of Agriculture, to name only a few. Each of the federal agencies directly involved in procurement of goods and services for the government has been assigned to police compliance with the Executive Order in specific industries, and the compliance agency for your client's particular industry will not necessarily be the one for whom the client is performing the government contract.

With these rudimentary matters in mind, I can turn to the threshold compliance question of who is subject to the Executive Order and what kinds of transactions are covered thereby. The Executive Order, read together with the OFCC's implementing regulations, require that all contracts between the

government and a private concern contain a written EEO clause which sets forth in general terms the contractor's commitment (1) to non-discrimination, (2) to develop a written affirmative action program if he employs 50 or more workers and his contract is for $50,000 or more, and (3) to file various reports and certificates and to make his records available for inspection by the government.

But what happens if your client has no written contract with the government or the written contract does not contain an EEO clause? The question arises whether equal opportunity obligations are contractual in nature and apply only when specifically agreed upon by the contractor or whether the obligation arises by operation of the Executive Order. The OFCC's implementing regulations provide that the EEO clause is implicitly incorporated in every government clause by virtue of the Executive Order and the regulations themselves. Two district courts have sustained this view.[4] In both of those cases, the Justice Department sued public utilities supplying essential power and service to the government for specific performance of the EEO clause, even though the clause was not physically incorporated into the written agreements. In both cases, the courts held the companies bound on the grounds that anyone doing business with the government is subject to all statutes governing government contracts and that the Executive Order had the force of such statutory law. The precedential underpinnings of those cases are dubious since the courts relied upon an early Supreme Court case holding only that the war powers provision of the Constitution gave the Executive the authority to terminate government contracts upon a showing of necessity. It is quite a different matter to say, as these two courts held, that, as a principle of general application, the government may vary written terms of a contract based upon executive fiat incorporating by reference wholly new contractual obligations not originally contemplated by the parties.

Even if the law of these cases is sustained by higher courts, they may not be dispositive of another kind of situation. At least in one of the foregoing cases,[5] the court noted that the government contractor had been given actual notice of the requirements of Executive Order 11246. If there is neither an express agreement to the EEO clause by the contractor or actual notice thereof, there remains some question of whether the contractor can be bound thereby, particularly since the Executive Order, if read literally, provides that any such obligations be created contractually rather than by operation of the law. However, because the courts have broadly construed the federal commitment to the policy of equal employment opportunity, a lawyer must counsel his client that there is a strong possibility that any transaction with

[4]United States v. New Orleans Public Service Inc., 8 FEP Cases 1089 (E.D. La., 1974); United States v. Mississippi Power & Light Co., 19 FEP Cases 1084 at 1089 (S.D. Miss., 1975).

[5]United States v. New Orleans Public Service Inc., *supra*, n. 4.

the government covered by the OFCC's regulation subjects him to an equal employment opportunity obligation.

An even more intriguing question, fraught with serious practical difficulties, related to whether a *subcontractor* to a government contract can be bound to the EEO clause only by virtue of the contractual relationship or whether this can be achieved by operation of the Executive Order. In this regard, the Executive Order requires all government contractors to include the EEO clause in all subcontracts necessary to the performance of the prime government contract with the Government. If you represent the prime government contractor, you will want to make certain that your client avoids the pitfall of inadvertently failing to incorporate the EEO clause in all covered subcontracts, including purchase orders for goods as well as contracts for services. Otherwise, the prime contractor may find himself in the following dilemma. The Government may cancel his prime contract for failure of the subcontractor to comply with the EEO clause. The subcontractor, on the other hand, having no such clause in his agreement with the prime contractor and not being put on notice thereof, may refuse to comply and further, even sue the prime contractor for breach of contract resulting from the government's cancellation of the prime contract.

If a prime contractor comes to you after he has already found himself in a situation of this kind, there are two possible courses to follow. You may refer the subcontractor to the OFCC's regulations providing that the equal employment clause is incorporated into the subcontract by operation of the regulations and assert that the subcontractor is bound thereby whether he had notice or not. However, for reasons already expressed, it is certainly questionable whether this provision of the regulation is authorized by and consistent with the Executive Order. The second possible course of action is to invoke those provisions of the OFCC's regulations requiring the contracting agency to engage in mediation and conciliation of any disputes before it imposes a sanction such as contract cancellation. Under this provision, you may be able to entice the agency to involve the recalcitrant subcontractor in a tripartite conciliation effort between the prime contractor, the subcontractor and the agency to resolve the dilemma on a negotiated basis.

Finally, with respect to coverage under the Executive Order, the practitioner should familiarize himself with the provisions of the regulations for exemptions (41 C.F.R. 60-1.5). Generally, contracts and subcontracts that are under $10,000 are exempt[6] as are contracts to be performed outside the United States with labor recruited outside the United States. Further, the Director of the OFCC may in his discretion exempt contracts when it is in the national interest or when national security reasons are present.

[6]Where a contractor has several contracts, or is providing an indeterminate amount of goods or services, the aggregate of the annual business done with the government is generally controlling.

B. *Compliance with Nondiscrimination Requirements of EEO 11246*

Next for consideration are the problems of compliance with each of the three major provisions of the Executive Order: (1) the nondiscrimination requirement; (2) the affirmative action requirement, and (3) the reporting and disclosure requirement.

First, with respect to the nondiscrimination requirement contained in the EEO clause, the contractor should examine his employment policies and practices in light of the legal criteria that have been developed by the courts for interpreting Title VII and the Equal Pay Act. Satisfaction of these criteria is at the least the fundamental requirement of the EEO clause. Of principal concern will be possible systematic discrimination in areas such as testing requirements; discriminatory recruitment practices; and those sensitive areas such as seniority, lay-off and promotion rules, which perpetuate past practices of discrimination against an "affected class." It is unquestionably to the client's advantage to identify and correct any of these problems before they are ferretted out by the governmental compliance agencies, all of whom have become within the last year vigilant and vigorous in their compliance activities. For one thing, it is much more economical for the contractor to undertake corrective measures voluntarily, since under the OFCC's recently proposed guidelines, back pay has become a normal remedy for the so-called "affected class" type of violations. Moreover, corrective adjustments can be made in a much more orderly manner if planned in advance rather than taken precipitously under the threat of summary debarment or cancellation of an existing contract.

However, the difficulties of identifying at least the "affected class" situations have been compounded by the vagueness of the OFCC's proposed guidelines which seem to be broader than the criteria developed by the courts for finding similar violations under Title VII. Thus, the guidelines state that any employee who continues "to suffer the relief" which statement is so broad as to include any employee who at any time was ever discriminated against and presently is working in a lower paid job classification as a result thereof even if the employer maintains no present practices which restrict his movement out of the job in which he was initially placed. Under Title VII past discrimination is remedial only if the employer maintains a current practice, such as departmental seniority, which inhibits the employees from transferring out of jobs in which they were discriminatorily placed. There exists a great deal of controversy over whether the OFCC's guidelines are valid insofar as they may require more of government contractors than is required under Title VII. Certainly the language of Executive Order 11246 would not justify such an expansive reading. Nevertheless, some caution must be exercised in advising clients as to whether he can ever be certain that he has complied with the OFCC's interpretation of Executive Order 11246.

Where a union contract maintains a provision which may have the effect of inhibiting employment opportunities of an affected class, these must be changed. The guidelines specifically refuse to recognize such union agreement as a defense. If the required revisions in the collective bargaining agreement cannot be achieved through negotiation with the union, you may wish to consider resorting to an action for declaratory judgment seeking a determination of whether the EEO clause in the government contract requires changes in the collective bargaining agreement. *Jersey Central Power & Light Co. v. I.B.E.W.*, ____ F.2d ____, 9 FEP Cases 117 (3rd Cir., 1975).

New Jersey Central Power & Light, is an interesting case and, although it arises in an EEOC context, it is instructive in dealing with similar problems that could emerge under the Executive Order. As a result of a charge filed with the EEOC in 1972, the Company, the Unions, and the EEOC entered into a conciliation agreement which provided *inter alia* for an affirmative action program designed to increase the percentage of minority group and female employees employed by the Company. The Company and the involved Unions had a collective bargaining agreement which provided for lay-off and recall according to employment seniority. The Company found itself faced with the need to lay off a substantial number of employees which, if pursued on the basis of seniority, would result in a disproportionate impact on recently-hired black employees. Faced with Union claims that work reduction should proceed according to reverse seniority and EEOC claims that any reduction in force had to be made so as to obtain a larger proportion of minority employees and women action for declaratory relief naming both the Unions and the EEOC as parties.

The Third Circuit held that a facially neutral Company-wide seniority system, without more, is a *bona fide* seniority system and will not be modified even though it will operate to the disadvantage of females and minority groups as a result of past employment practices. The Court observed that none of the evidence before it demonstrated that the seniority provisions of the collective bargaining agreement were not *bona fide*, and remanded the case to the District Court for further proceedings. On the petition of the EEOC, and the Company the Supreme Court has granted *certiorari*. Not only is the substantive iss of great significance, but the court's approval of the declaratory judgment procedure to resolve the conflicting claims made against the employer is a useful precedent in this area.

C. *Compliance with Requirements for an Affirmative Action Program: Quotas or Goals?*

The OFCC's affirmative action guidelines (41 C.F.R. 60-2.1 to 60-2.32) requires every contractor or subcontractor with 50 or more employees and a contract of $50,000, to develop a written affirmative action program to promote the goal of equal opportunity in employment. In its ideal form the

affirmative action program, as contemplated by the guidelines, is a critical self-analysis of the employer's deficiencies and the development of a plan for correcting such deficiencies.

The central aspect of the affirmative action program is the requirement that the employer establish numerical goals and time tables for the employment and promotion of minority group members. These goals must reflect the percentage of minority group persons available in the work force for the applicable geographical area in which the employer's facility is located. Whereas, in large metropolitan areas, there may be more than one "geographical area" to choose from (that is, a limited suburban district as opposed to a more extensive metropolitan area), the government compliance agencies will invariably require the contractor to use the geographical area yielding the highest number of minority groups in the labor force.

The incipient danger in the use of goals is that under the pressure of the compliance agency to meet these goals, the employers may yield to the temptation to resort to quota or preferential hiring. The practice of quota hiring raises serious legal questions where qualified non-minority applicants are rejected because they do not help fulfill the employer's goals. Reduced to basic terms, this amounts to rejecting such applicants because of their race, sex, religion or national origin. There is an alternative to meeting the goal requirements of the affirmative action program which, though more difficult in application than quota hiring, is a much more advisable practice. That alternative is for the employer to intensify his recruitment efforts from those sources and from those areas of the community which will yield a higher number of qualified minority applicants.

The moral implications of quota hiring aside, a contractor who resorts to such practice exposes himself to a potential legal action by the aggrieved person. Of course the law is currently unsettled on the issues of whether reverse discrimination violates Title VII[7] and whether governmental action precipitating reverse discrimination constitutes a denial of equal protection.[8] Indeed, one of the most significant questions currently pending before the Supreme Court this term is whether reverse discrimination violates Title VII. In that case, *McDonald v. Santa Fe Transportation Co.*,[9] the Court will review the Fifth Circuit's determination that Title VII did not protect Caucasians from employment practices which discriminated in favor of minority employees. The Court's decision on the issue will certainly affect the manner in which the OFCC can use goals.

Although a number of courts have approved the use of preferential hiring requirements as a remedial measure to rectify discriminatory prac-

[7]McDonald v. Santa Fe Transportation Co., 10 FEP Cases 1165 (5th Cir., 1975), *cert. granted*, U.S. Supreme Court No. 72-260, 212 DLR at page A-2.

[8]DeFunis v. Odegaard, 416 U.S. 312 (1974).

[9]*Supra*, note 7.

tices, most of those same courts have recognized that use of quotas to correct racial imbalance in an employer's work force where unrelated to discrimination is not justified. *Rios v. Steamfitters Local 638*, 501 F.2d 622, 8 FEP Cases 293 (2nd Cir., 1974) and cases cited.[10] If reverse discrimination is determined to be unlawful under Title VII, there will have to be some rethinking of these cases. In any event, however, the goal provisions of the affirmative action programs required by the Executive Order are not predicated on past discrimination by the contractor, but merely on the racial imbalance in his work force. Consequently, there is probably no legal justification for satisfying the goals through quota hiring. Accordingly, at least until the law becomes settled, one cannot easily discount the threat of liability, by way of a class action possibly, for quota hiring.

Finally, the view is held in some quarters that as currently implemented, the OFCC's regulations and guidelines improperly foster quota hiring, which might well be violative of the Equal Protection Clause, if not the Executive Order itself. Although the regulations of the OFCC are laced with disclaimers of rigid enforcement of the goal requirements, they also provide that a substantial departure from any provision of a contractor's affirmative action program which, of course, includes specific goals, is grounds for cancellation, debarment or other sanctions. (*Compare* 41 C.F.R. § 60-2.2(c) and 60-2.12(k).) At least in some circumstances the only way a contractor may be able to meet the requisite goals and avoid a substantial deviation therefrom is through quota hiring. Currently, the order of the federal district court in the *Alameda*[11] case is being challenged on appeal on the grounds that it construes and implements the OFCC's goal requirements so as to require, in effect, quota hiring. In that case it is being urged that such a requirement is unconstitutional.

Another aspect of the affirmative action program requirements deserves particular care. Although the purpose of such AAP's is to occasion a critical self-analysis by the employer, it must be borne in mind that these AAP's may be subject to disclosure to either the EEOC or litigants engaged in discovery and even to members of the general public. Even though regulations provide that the AAP is to be kept at the employment location at which it applies it is subject to disclosure to the agency compliance officer. Pursuant to the memorandum of understanding between the OFCC and the EEOC a compliance agency is required to make available any information pertaining to a government contractor against whom a charge has been filed with the EEOC. 39 F.R. 35855 (October 4, 1974). Moreover, under OFCC regula-

[10]The court in *Rios* was of the view that strict mathematical hiring quotas was a proper remedial measure if they were of a temporary nature to be abandoned once the minority composition of the employer's work force reached equilibrium with the ratio of minorities in the relevant labor market.

[11]The Legal Aid Society of Alameda County v. Brennan, 381 F.2d 125, 8 FEP Cases 178 (D.C. Cal., 1974), on appeal to the Ninth Circuit, No. 74-3014.

tions parts or all of such data may be disclosed to the public pursuant to the current interpretation of the Freedom of Information Act. Therefore, some care should be exercised in drafting the affirmative action program so as to avoid making unnecessary admissions and insuring that all statements are placed in a proper context.

D. *The Pitfalls Inherent in the OFCC's Reporting Requirements*

The OFCC regulations, of course, require the government contractor to file certain reports, including the EEO-1 and to disclose all of its records relevant to compliance upon request. The crucial feature of which one should be aware is that once the records or data of the government contractor becomes part of the compliance agency's files it may be subject to disclosure either to the general public under the Freedom of Information Act or to the EEOC pursuant to the special inter-agency agreement already mentioned.

Accordingly, there are two procedures for opposing disclosure, of which the practitioner should be aware. First, the OFCC's regulations (41 C.F.R. 60-60.4) provide for administrative consideration of objections to the production of documents requested by a compliance officer on the grounds of relevancy. Further, these regulations provide the contractor with a procedure for having any information classified as confidential and hence exempt from disclosure to the public under the Freedom of Information Act. Moreover, there is at least one pending case in which the authority of the OFCC and its compliance agency to make any disclosures of EEO related information obtained from government contractors is under attack. (*Castilio, et al. v. Dunlop and the Chamber of Commerce of the United States,* pending before the Ninth Circuit in Appeals Nos. 75-1870, 75-2858.) There is a serious question raised in that case concerning whether Section 709(e) of Title VII which bars the disclosure of EEO information to the public applies to the OFCC and its compliance agencies as well as to the EEOC. In a related proceeding Justice Douglas, ruling upon a motion for stay, strongly indicated that Section 709(e) would prevent the disclosure by any government agency of EEO data since the policy of that statute was to insure cooperation with the Government through an assurance of confidentiality.[12] However, it should be noted that this view has been rejected by some district courts.[13]

The second avenue for obtaining relief from disclosure of the contractor's EEO data if the administrative procedures are unavailing is through the courts pursuant to the Administrative Procedures Act[14] or possibly the

[12]Chamber of Commerce v. Legal Aid Society, U.S. Sup. Ct. No. A-233, decided September 29, 1975; *See also,* Administrator, F.A.A. v. Robertson, _____ U.S. _____, S. Ct. 2140 (1975).

[13]*E.g.*, Sears, Roebuck & Co. v. G.S.A., _____ F. Supp. _____, 8 FEP Cases 1155 (D.D.C., 1974).

[14]Sears, Roebuck & Co. v. G.S.A., *supra,* n. 13.

Declaratory Judgment Act. Limited relief has been obtained in some cases wherein the courts have enjoined the disclosure of those portions of an employer's EEO data which are considered confidential commercial information.[15] However, those cases provide only limited relief in exempting from disclosure confidential trade secrets, commercial or financial information or personnel data, the disclosure of which would constitute an invasion of personal privacy.

In addition to the possibility that a government contractor's records may be disclosed to the public there is also a provision by which the OFCC or its compliance agencies will disclose all such information in its files to the EEOC once a charge has been filed against that particular government contractor. As already indicated, the alleged authority for this provision is a memorandum of understanding of September 11, 1974[16] For those of you who have clients whose interests are aggrieved by such inter-agency disclosure, there is the possibility of judicial relief by way of a declaratory judgment suit. Currently there are at least two cases[17] in which disclosure pursuant to the memorandum of understanding is being challenged on the grounds that (1) the memorandum of understanding constitutes a rule within the meaning of the Administrative Procedures Act and was not promulgated in accordance with the rule making procedure of the APA (2) it violates a specific statutory prohibition against the interchange of information between agencies,[18] (3) that the memorandum constitutes the usurpation of the authority of another governmental body (*see* Section 715 of Title VII of the Civil Rights Act) and (4) the procedures outlined in the memoranda constitute a denial of administrative due process because they provide for no notice, hearing or appeal from an adverse agency decision to disclose the information.

There is still another means by which disclosure of a government contractor's compliance data might result. In *Legal Aid Society of Alameda County v. Brennan, supra* (on appeal sub. nom. *Castilio v. Dunlop and the Chamber of Commerce of the United States*) a federal district court ordered that AAP's and other compliance data furnished by government contractors to a compliance agency be disclosed to a private litigant pursuant to discovery proceedings. It would appear in a case such as that where discovery is being made of documents generated by a private contractor although such documents are in the files of the Government, that the private contractor

[15]Westinghouse Electric Corp. v. Schlesinger, 7 FEP Cases 682 (E.D. Va., 1974); United States Steel Corp. v. Schlesinger, 8 FEP Cases 923 (E.D. Va., 1974); General Motors Corp. v. Schlesinger, 8 FEP Cases 923 (E.D. Va., 1974); Sears, Roebuck & Co. v. G.S.A., _____ F. Supp. _____, 8 FEP Cases 1155 (D.D.C., 1974).

[16]39 F.R. 35855 (October 4, 1974).

[17]Emerson Electric Company v. Schlesinger, C.A. No. 12-75-A (E.D. Va.); Chrysler Corp. v. Brennan, No. 74-850-C (E.D. Mo.).

[18]44 U.S.C. § 3508.

would have standing to intervene at least for the purposes of opposing discovery. A more serious and more interesting issue being litigated on appeal in that case concerns the standing of such a private party to invoke the exemptions from disclosure under the Freedom of Information Act when the Government itself has disclaimed any reliance thereon. Even though many of the FOIA exemptions are in the literal terms of the statute for the benefit of the Government, there is some legislative history and support in the case law[11] for the proposition that the exemptions are available to private parties to protect data they have submitted to the Government.

III. REPRESENTING THE CLIENT IN AGENCY PROCEEDINGS: DEFENDING CHARGES OF NONCOMPLIANCE WITH THE EXECUTIVE ORDER

A. *Introduction—The Consequences to a Government Contractor of Noncompliance with the Executive Order 11246*

Having discussed above some of the problems entailed in assisting a client in structuring his compliance program, attention must now be given to some of the more important aspect of handling charges of noncompliance. This aspect of the practitioner's art is particularly delicate because not only are the stakes high, but the Government has a great deal of leverage. This is because the ultimate sanctions for noncompliance are cancellations of an existing contract and debarment from future contracts, which for many clients would deprive them of a lucrative source of income. Moreover, the Government has sought to increase its leverage by asserting the right to summary *de facto* debarment without a hearing for an alleged violation. This weapon, in most instances, maximizes the pressure on the government contractor to settle. With this appreciation for the possible exposure of the clients resulting from possible noncompliance, we can next turn to the agency procedures for determining matters of compliance.

B. *The Agency Procedures for Administrative Determination of Charges of Noncompliance*

There are essentially four stages of the agency proceedings beginning with the investigative phase and ending with an administrative hearing and final determination.

Compliance Review. The investigative procedures are ordinarily begun with a compliance review which more often than not is conducted on the basis of a random selection of contractors for review. The review may consist of little more than an audit of the affirmative action program or it may entail

[11]Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 82 (D.C. Cir., 1974) *reh. denied*, 502 F.2d 1179.

an on-site review of the employer's AAP and supporting personnel records together with employee interviews or even the submission to the compliance officer of substantial data and documentation for an off-site analysis. Investigations may also be initiated by charges filed with the compliance agency by aggrieved persons.

Mediation and Conciliation. If the preliminary determination is made by the agency that a violation exists, that agency is required by the Executive Order to seek mediation and conciliation as a condition to proceeding further, although the OFCC regulations provide in some instances for summary debarment on an interim basis prior to mediation and conciliation (41 C.F.R. 60-2.2(c)). It is during the mediation and conciliation proceedings that you will be able to dispose of most matters. Ordinarily the agencies have demonstrated a great deal of flexibility in formulating remedial measures to resolve the alleged noncompliance.

Show Cause Order. If mediation and conciliation fails, a compliance agency will issue an order to show cause why a specific sanction should not be levied against a contractor for the alleged violation. To this initial pleading the contractor is required to file a written answer and the stage is set for the formal administrative hearing and decision.

Administrative Hearing and Final Determination. Where a contractor has been served with an order to show cause he must, together with his answer, file a request for a hearing. Upon such request he is entitled to a full evidentiary hearing before a duly appointed hearing officer and the right to representation by counsel. At the cose of the hearing the hearing officer prepares a recommended decision to which the parties have the opportunity of taking exceptions and the final decision is made by the head of the compliance agency after approval thereof by the Director of the OFCC (41 C.F.R. 60-1.20 *et seq.*).

Having in mind the procedural steps in a compliance case, we may next concern ourselves with some of the tactical considerations. As already mentioned, you will want to explore carefully on behalf of your client the possibility of reaching an agreement with the agency through mediation and conciliation. For the most part, the compliance agencies and the OFCC have exhibited a great deal of flexibility not only in fashioning prospective remedial measures, but also in establishing a back pay formula in matters such as alleged "affected class" violations. However, you should be fully cognizant that such settlements with the compliance agencies or the OFCC are not binding upon the EEOC or private litigants under Title VII at least where the grievants have not individually signed releases pursuant to such a settlement agreement. Although the effect of such releases signed by individual employees has not been definitively settled you may seek to enhance the effectiveness of such a settlement agreement by obtaining releases and thereby seeking to bind those individuals executing such releases. *See United States*

v. Allegheny-Ludlum Industries, 63 F.R.D. 1, 8 FEP Cases 198 (N.D. Ala., 1974), *aff'd*, 11 FEP Cases 167 (5th Cir., 1975).

Where the issues of the case are complex, cutting across different areas of the law, and the potential violations are extensive, a so-called coordinated settlement may constitute a feasible tool for extricating your client in an orderly manner. The unique feature of a coordinated settlement is that both the EEOC and the OFCC and even possibly the Department of Labor are parties thereto and the settlement is comprehensive enough to dispose of all claims by the Government, at least, arising under the Executive Order, Title VII and the Equal Pay Act. An example of this approach is the ATT coordinated settlement executed on January 18, 1973. This approach not only makes peace with the government agencies involved (and thereby removes the threat of an OFCC debarment or contract cancellation) but may well discourage and inhibit the bringing of class actions although it will not be a bar to such class actions for employees who decline to execute releases.

In balancing the merits of settlement as opposed to the advantages of contesting the issues in an administrative hearing, some attention should be devoted to the interaction between the OFCC and the EEOC's enforcement procedures. For instance, if you decide to litigate an alleged violation of the government contractor's obligations under the Executive Order you will be developing an evidentiary record in an administrative hearing, which record may well find its way into the hands of the EEOC or even potential class action litigants. This may afford our potential adversaries with a valuable insight into the Company's policies and practices. Also, in this same vein you may find it futile to contest the OFCC's jurisdiction or authority in some matters such as whether it is authorized to award back pay, since it is often the OFCC's procedure merely to refer alleged violations which are not settled by it to the EEOC for investigation and prosecution. Moreover, do not overlook the possibility that this referral practice may be used to your advantage in certain situations. Thus, where a union proves recalcitrant by refusing to alter offensive provisions in its collective bargaining agreement, you may be able to persuade the union to settle by pointing out that the OFCC has in the past referred such matters to the EEOC.

Finally, there is the question of whether and to what extent judicial review is available to check abuses or errors of law committed by the OFCC or its compliance agency. One aspect of this problem is whether, if after having exhausted your administrative remedies, you may obtain judicial review of the final agency determination. It is quite likely that the Administrative Procedures Act may be construed to confer jurisdiction upon the federal courts for at least limited judicial review. A second aspect of this problem involves the jurisdiction of the federal courts to enjoin agency policies or practices which are *ultra vires* such as possibly the award of back pay to aggrieved employees by the OFCC or its compliance agencies. This question is discussed more fully later. It is sufficient to note here that despite

one district court decision to the contrary, such suits probably may be maintained under the Administrative Procedures Act (5 U.S.C. § 705).

C. *Remedies and Sanctions Employed by the OFCC and Compliance Agencies*

Any decision concerning whether to settle or contest a question of compliance under Executive Order 11246, necessarily entails a consideration of what sanctions and remedies may be imposed against the government contractor. Often the most crucial sanction to which the OFCC lays claim is summary *de facto* debarment. Although the Executive Order provides that no contractor can be debarred without a hearing, Section 60-2.2(b)(c) of the OFCC's regulations provide that a contractor in violation of the affirmative action requirements may be declared nonresponsible prior to a hearing and thus suspended from eligibility to bid on a government contract during the pendency of such hearing and final agency decision. This, of course, is nothing less than summary *de facto* debarment. There are some limitations upon this procedure contained in the OFCC's regulations which you will want to consult but it remains a potent weapon for coercing government contractors into accepting the OFCC's views of compliance. In *Crown Zellerbach v. Wirtz*,[20] Judge Sirica found that the Executive Order required notice and hearing before the contractor could be debarred. However, a subsequent decision in the Southern District of New York, *Commercial Envelope*,[21] held to the contrary, without dealing at all with the *Crown Zellerbach* decision or its rationale. In my view *Crown Zellerbach* is correct and summary *de facto* debarment not only violate the Executive Order, but also constitutes a denial of administrative due process. Certainly you want to be aware of this potential tool for attacking the procedure if your client is confronted with such a situation.

While a summary *de facto* debarment is an interim sanction pending the outcome of the agency's decision, there are of course ultimate sanctions for noncompliance authorized by Section 209 of the Executive Order. These are cancellation, permanent debarment and an action in the federal courts for specific enforcement of the contract or for an injunction restraining violations of the EEO clause. The injunctive relief authorized extends not only to the contractors but individuals or groups "who prevent directly or indirectly . . . compliance with the provisions" of the Executive Order. This presumably authorizes actions against recalcitrant unions who attempt to block compliance with the provisions of the EEO clause.

You will note that the Executive Order nowhere explicitly authorizes compliance agencies to assess back pay against any government contractor.

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[20]281 F. Supp. 337, 1 FEP Cases 275 (D.C.C., 1968).

[21]Commercial Envelope Manufacturing Co., Inc. v. Dunlop, _____ F. Supp. _____, 11 FEP Cases 117 (S.D.N.Y., 1975).

Nevertheless, the OFCC and its proposed guidelines of affected class and back pay (*Federal Register* dated March 26, 1975) asserts that it has this power. You will want to check these guidelines for the limitations period applied (two years for ordinary violations, three years for willful violations) and the formula for determining back pay. The authority of the agencies to assess back pay under the Executive Order was challenged in *Kerr Glass Manufacturing v. Dunlop*, CA 74-0597 (D.D.C.). Questions concerning the legal authority for such remedy stem not only from the lack of any explicit provision therefor in Executive Order 11246, but also upon the limited nature of the statutory authorization underlying the Executive Order itself. If, as the Third Circuit has held,[22] the justification for the Executive Order lies in insuring the Government a broad pool of labor, a retroactive remedy such as back pay would not serve that purpose and therefore would be extraneous to the legitimate purposes for which the Executive Order was promulgated. In my view, these are persuasive theories for challenging the OFCC on this issue, but the courts have not yet ruled.

The district court in *Kerr Glass* did not reach that issue because it found that the contractor had not exhausted his administrative remedies before the compliance agency. With all due respect, I believe the court to have erred and misapplied *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which authorizes declaratory judgment to review the sufficiency of an agency's rules where such rules affect a broad class of persons. The OFCC's guidelines effectively constitute "rules", particularly since they are currently being implemented, and should not be immune from immediate judicial review. The Government used a ploy in that case which may have influenced the decision when it simply declared that summary *de facto* debarment would not be instituted against the contractor, and asserted that accordingly there was no imminent jeopardy threatened. It may be that the only manner in which to overcome this obstacle is through a class or an associational suit alleging that the backpay guidelines affect all government contractors and that the agency's practice has been manipulated to avoid judicial review.

A final word on the effect of OFCC remedies. Like settlements entered into with the OFCC, its decisions and remedial relief imposed do not bar either Title VII actions or the imposition of broader relief based upon the same conduct.

[22]Contractors Association of Eastern Pennsylvania v. Secretary of Labor, et al., 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

IV. CONCLUSION

As is apparent from the foregoing remarks, the law in this area is in a state of flux, especially with respect to the parameters of the OFCC's authority, not only with respect to its procedures, but with respect to its substantive interpretations of the provisions of Executive Order 11246. The practitioner dealing in this area will find himself challenged not only with respect to his scholarship, but with respect to his tactical skills and intuition. Hopefully within the next few years the courts will lend some definitive guidance which will enable government contractors to fulfill their EEO obligations in an orderly and coherent fashion.

MOTION FILED
FEB 27 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY SOUTHEASTERN LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AND BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

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February 28, 1979

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE, FOR LEAVE TO FILE A BRIEF

In accordance with this Court's Rule 42, Southeastern Legal Foundation, Inc. ("Southeastern") moves this Court for leave to file the attached brief *amicus curiae* in the above case. Concurrent with the filing of this motion, Southeastern has transmitted to the Clerk of this Court copies of letters of consent from petitioners United Steelworkers and Kaiser, and from respondent Brian F. Weber. The Solicitor General, on behalf of petitioners United States of America and

Equal Employment Opportunity Commission, has refused consent to Southeastern, but has stated that he will not oppose the filing of this motion. A copy of the Solicitor General's letter is also on file with the Clerk.

Southeastern is a Georgia not-for-profit corporation organized for the purpose of advancing the broad public interest in adversary proceedings involving significant issues. Southeastern takes a special interest in questions of law of a national scope that have a direct effect on the southeastern region. Southeastern is dedicated to economic and social progress through the equitable administration of law. Although it has no direct interest in this case as an organization, it represents the members of the public who share Southeastern's dedication to assisting the courts in guaranteeing that the rights of all persons are properly protected and balanced in the courts. Southeastern's representation of the public interest includes the representation of the several hundred individuals and organizations which contribute financially to Southeastern.

In addition to the filing of a brief *amicus curiae* with the Fifth Circuit in the instant case, Southeastern has participated as *amicus curiae* in other employment discrimination cases involving "reverse discrimination." Southeastern filed a brief *amicus curiae* in *Virginia Commonwealth University v. Cramer*, No. 76-1937 (4th Cir. Aug. 15, 1978), and in 1977 urged a reconsideration of the steel industry consent decrees of 1974. That latter effort led to a memorandum opinion, by the District Court for the Northern District of Alabama, which clarified its view of the legality of the steel industry consent decrees. *United States v. Allegheny-Ludlum Industries, Inc.*, No. CA 74-P-0339-S (N.D.Ala. Mar. 21, 1978) (cited at p. 4 of the United Steelworkers brief to this Court in this case).

However this Court decides this case, its holding has the potential of becoming a signpost to all who are concerned about the direction of affirmative action in employment. The Court has the opportunity to explain what will be considered permissible affirmative action in employment and by whom and when it may be undertaken or ordered. In view of the potentially broad impact of this case, the participation of *amici curiae* is especially appropriate. Southeastern does not presume to represent the totality of the public interest. However, we believe the attached brief presents an important public interest view which will otherwise not be presented to the Court.*

Respectfully submitted,

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* Last term, this Court permitted Southeastern to appear as *amicus curiae* in Duke Power Company v. Carolina Environmental Study Group, Inc., 434 U.S. 937 (1978); United States Nuclear Regulatory Commission v. Carolina Environmental Study Group, 434 U.S. 937 (1978); and Tennessee Valley Authority v. Hill, 435 U.S. 902 (1978).

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., **AMICUS CURIAE**

INTEREST OF AMICUS CURIAE

The interest of Southeastern Legal Foundation, Inc. ("Southeastern") and its reasons for participating in this case are set forth in the attached motion for leave to file this brief. That statement of interest is incorporated herein.

SUMMARY OF ARGUMENT

The use of quotas as a method of selecting eligible workers for jobs or other benefits of employment should be strictly limited to remedying the effects of past illegal discrimination against identifiable victims of that discrimination. Such remedial quotas should operate to place a discriminatee into his or her "rightful place," which would have been occupied by the discriminatee but for previous illegal discrimination. The use of quotas conditioned upon findings of past illegal discrimination and limited to assisting identified victims of that discrimination creates no new victims and thereby eliminates the possibility of "reverse discrimination."

Although a quota does not operate to return an injured discriminatee to his or her rightful place as accurately as does an adjustment of seniority, it is an acceptable remedial tool so long as it does not operate to create new victims of discrimination.

This limited use of quotas guarantees protection for all workers by producing remedies for past injuries while not creating new injuries. It is premised upon specific findings of past discrimination and specific identification of victims in each case. To the extent it requires such findings, this approach may well discourage the use of quotas voluntarily or in settlement agreements.

The practical result of this approach is that quotas would be limited to case-by-case agency, legislative, and judicial determinations which include specific findings of past illegal discrimination and identifiable

victims. Southeastern believes that this limited approach to the use of quotas is the only approach consistent with the Constitution, Title VII of the Civil Rights Act of 1964, equitable principles, fundamental fairness and the decisions of this Court.

ARGUMENT

I.

Employment Quotas Should Be Strictly Limited To Remedying The Effects of Past Illegal Discrimination On Identifiable Victims of That Discrimination

Southeastern urges this Court to affirm the holding below insofar as it states (a) that employers and unions may not, pursuant to Title VII, voluntarily adopt racial quotas in the absence of a finding of prior hiring or promotion discrimination, and (b) that preferences assisting individual victims of discrimination are permitted by Title VII. *See Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 224-25 (1977), *rehearing denied*, 571 F.2d 337 (5th Cir. 1978) (*"Weber"*).

Southeastern believes that such findings are a prerequisite to the use of quotas as individualized relief. Boiled down to its bare bones, this case is about whether one worker may be arbitrarily preferred over another in employment opportunities when both are equally situated. As characterized by the petitioners, this case is about the permissible scope of Title VII voluntary compliance. While that is an important feature of this case, undue attention and deference to voluntary compliance as a feature of Title VII tends

to obscure that this case is about rights. Indeed it is a certain type of voluntary compliance—the quota—which the courts below found to have violated some of those rights.

Southeastern believes that a quota can be used in a way that protects the rights of all workers. A quota which works to remedy the injuries of past employment discrimination and at the same time respects the rights of incumbent non-victim workers serves the goal of equal employment opportunity for all. A quota which grants preferential treatment to some at the expense of others falls short of that goal of equality. The quota adopted by Kaiser and United Steelworkers was a quota of the latter type.

A quota which seeks to place an individual worker in the position he would have held but for illegal discrimination against him, need not simultaneously operate to discriminate against some other worker. As the Fifth Circuit said in the decision below:

> "A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment 'not because he is Black, but because, and only to the extent, he has been discriminated against.' "

Id. at 224. Another way of expressing the Fifth Circuit's statement is that a quota is only objectionable if it affects two equally situated individuals and grants a preference to one of them. If, on the other hand, a quota is used only to place an identified victim of past discrimination in his rightful place, the quota discriminates against no one. Its operation is strictly

remedial. The use of a quota in this latter sense is to reconstruct what would have happened to the victim of past discrimination if he had been treated equally with his peers at the time of the discrimination. While a quota does not operate to place a victim of past discrimination in his rightful place as successfully as an award of proper seniority, in certain situations it may be the most efficient remedial tool available.

Southeastern reads the Fifth Circuit's opinion to require, as a prerequisite to using quotas, both a finding of past discrimination and an identification of individual victims. *See id.* at 224-25. The first part of the test is expressly stated by the Fifth Circuit. The second part of the test is expressed through the use of the term "rightful place." Both parts of the test are founded upon decisions of this Court.

In *Regents of University of California v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2755 (1978) ("*Bakke*"), Mr. Justice Powell stated that this Court had never approved preferential classifications in the absence of proven constitutional or statutory violations. In his discussion of employment discrimination cases, he noted that racial preferences were premised upon the need to remedy injuries caused by past discrimination. *Id.*, 98 S.Ct. at 2754. Thus a finding of past discrimination and a need for remedial relief are prerequisites to the use of quotas.

This Court has also held that the process of returning victims of past discrimination to their "rightful places" demands an identification of the actual victims of the discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72

(1977) ("*Teamsters*"). *Teamsters* dealt with seniority rights as opposed to quotas, but the goal of the remedial relief was identical to that of the quota in this case—to put victims in their rightful places. If the restoration of seniority rights in *Teamsters* could be achieved only after evidentiary hearings which identified victims and disclosed the extent of necessary relief, *id.* at 376, no less is necessary for the use of quotas.

In sum, the proper test for the use of quotas requires both a finding of past illegal discrimination and an identification of victims.

II.

All Entities Which Adopt Employment Quotas Must First Satisfy The Discrimination-Finding and Victim Identification Test

Since the purpose of requiring discrimination-finding and victim identification is to guarantee that remedial quotas protect the rights of all workers, there can be no variations in the rigors of the test depending on what entity is applying it. Thus, the demands of the test apply to courts, government agencies, legislatures and voluntary parties. No other standard can guarantee equal employment opportunity for all.

All judicial decrees, including consent decrees, and government conciliation agreements, which include quotas, must be premised upon findings and identifications. If this Court should hold that the type of quota test asserted by Southeastern has retrospective application, existing decrees, settlements and agreements using quotas may be subject to challenge if they have

not been predicated upon adequate findings and identifications.

The Fifth Circuit held that the hiring ratio agreed to by Kaiser and United Steelworkers could not have been approved even if it had been judicially imposed. *Weber, supra* at 224. The approach of the Fifth Circuit properly assumes that the outer limits of remedial relief under Title VII are measured by what the courts can do in the name of equity and not by what private parties may do voluntarily. Even though the court did not "probe into the distinctions between court-ordered remedies and permissible remedies agreed upon voluntarily by private parties," *id.*, the court did say that "there is strong authority to support the position that courts are not subject to the same restrictions as employers." *Id.* at 223.[1]

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[1] If there is any ambiguity in the Fifth Circuit's opinion with respect to the permissible use of quotas, it comes from two statements found in its discussion of the district court's decision. First, the Fifth Circuit stated that "Title VII does not prohibit courts from discriminating against individual employees by establishing quota systems where appropriate." Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 223 n.12 (1977), *rehearing denied*, 571 F.2d 337 (5th Cir. 1978). The court's choice of words is unfortunate. While Title VII permits judicially ordered quotas, such quotas are remedial and do not discriminate "against individual employees" if properly premised on findings and identifications. According to the Fifth Circuit's discussion in the text following footnote 12, such carefully conditioned quotas are what the court considered appropriate.

Second, by referring to the steel industry consent decrees and the Fifth Circuit's 1975 decision upholding them, *id.* at 223, the opinion leaves the impression that those consent decrees were legally correct in the adoption of quotas which were similar to the quota in this case. This impression must be

Petitioners argue that the Title VII goal of voluntary settlement permits private parties to adopt quota remedies without first having to make "findings" of past discrimination. If courts may not grant quota relief without first finding past illegal discrimination and identifying victims, then private parties must be at least, if not more, restricted in the adoption of quotas.

Even though this case does not involve a consent decree and this Court does not specifically have to address consent decree relief, Southeastern believes that any decision reached by this Court which does not consider the full range of possible quota-creating mecha-

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examined in light of a post appeal statement by the district judge that he had not determined whether there had been prior employer discrimination before he signed the consent decrees. *See* United States v. Allegheny-Ludlum Industries, Inc., No. C.A. 74-P-0339-S, memorandum op. 5, 9 (N.D.Ala. Mar. 21, 1978) (*"Allegheny-Ludlum"*).

It is inexplicable why the Fifth Circut arrived at what appear to be conflicting decisions in this case and the steel industry case. *See* United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The district judge has stated that the "essence" of the relevant steel industry consent decree "is a collective-bargaining agreement. . . ." *Allegheny-Ludlum, supra* at 3. The quota in this case is also contained in a collective bargaining agreement. Likewise in both cases there were no findings of discrimination before the quotas were adopted. If the only difference between *Weber* and the steel industry consent decrees is that the latter were subscribed by a judge, there is no meaningful difference. In retrospect, one further difference may be that the Fifth Circuit was not presented with reverse discrimination claims and arguments in the steel industry consent decree case. Southeastern suggests that the Fifth Circuit would decide the steel industry consent decree case differently today.

nisms, from voluntary programs to litigated decrees, will leave everyone—the courts, the government, and private parties—unclear as to their rights and responsibilities with respect to affirmative action relief. If this Court merely affirms the Fifth Circuit's decision, some may conclude that the law prevents voluntary agreements and judicially imposed quotas in the absence of specific findings and identifications, but that the law allows consent decrees such as the steel industry decrees. Such a result would be illogical and open the courts to manipulation efforts by private parties. As Judge Wisdom rightly noted in his dissent below, employers could use friendly suits to "circumvent the holding of *Weber*." *Id.* at 229 n.6 (Wisdom, J. dissenting).

Southeastern agrees with Judge Wisdom's logic that the holding of the majority in *Weber* necessarily means that district courts, "before accepting . . . consent decree[s], will be forced to determine the existence and extent of past discrimination by the defendants." *Id.* Southeastern believes Judge Wisdom's dissent correctly describes the implication of a requirement that quotas must be remedial only and premised only upon a finding of discrimination and an identification of victims.

Logic compels the further conclusion that everyone, private party, government agency, and court, is bound by the strict requirements of the "finding/identification" test.[2] Any other result would manifest a disre-

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[2] So long as there is a legally sufficient finding of past illegal discrimination and identification of victims, the use of quotas as remedial tools should be permitted. For courts and government adjudicatory agencies subject to judicial review, the

gard for the rights of employees innocent of any wrongdoing. In *Teamsters*, this Court showed particular concern for the legitimate expectations of innocent employees, by requiring the district court to strike a balance "between the statutory rights of victims and the contractual rights of non-victim employees." *Teamsters, supra* at 376.

Utilizing a quota as a remedial tool only when it operates to place identified victims of past illegal discrimination in their "rightful places" (or as close as

findings and identifications would be tested, of course, by the preponderance of the evidence standard. Private parties which adopt quotas cannot be expected to objectively examine evidence detrimental to themslves, and therefore a preponderance standard may not be an adequate safeguard as to them. Perhaps only findings which are the equivalent of admissions can justify the adoption of quotas by private parties. Thus, they may be said to adopt quotas at their own risk. While this approach may discourage voluntary agreements or settlements including quota provisions, it may be the only approach which satisfies all the relevant interests and legal standards while guaranteeing equal opportunity for all.

Acknowledging that the Congress may not be subject to the same limitations in relief choice as apply to courts, government agencies and private parties, Southeastern nevertheless believes that even a congressionally approved quota must be prefaced by what Mr. Justice Powell has called "detailed legislative consideration of the various indicia of previous constitutional or statutory violations. . . ." Regents of University of California v. Bakke, ___ U.S. ___, 98 S.Ct. 2733, 2755 n.41 (1978) (opinion of Powell, J.). Even if the Congress may be able to legislate the use of quotas, based on past constitutional or statutory violations, any entity responding to the legislative determination should still be required to apply the legislative determination on a case-by-case approach. In any event, Southeastern does not read the Title VII legislative history so as to justify the type of quota which has injured Weber.

practicable to their rightful places), strikes a proper balance. Innocent employees have no "legitimate expectations" subject to injury by the placement of victims of discrimination into their rightful places. But, unless this Court makes it absolutely clear that quotas may be used only after a finding of discrimination and an identification of victims, the rights of innocent employees will not be adequately protected.

This Court held in *Teamsters* that in striking the balance between statutory rights of victims and contractual rights of non-victim employees, a district court must "state its reasons so that meaningful review may be had on appeal." *Id.* ("contractual rights" in the *Teamsters* context means "seniority"). In the instant case it is more accurate to describe the two interests to be balanced as "the statutory rights of victims against the statutory rights of potential victims." If reasons for meaningful review were required in *Teamsters*, they are even more required here when statutory rights are balanced against each other.

As a practical matter, employees innocent of any wrongdoing have had a difficult time obtaining meaningful review of voluntary agreements, settlements and judicial decrees which contain quotas affecting those employees.[3]

[3] For example, attempts by incumbent non-minority steelworkers to challenge the scope and effects of the steel industry consent decrees have had no success. In Martini v. Republic Steel Corp., 532 F.2d 1079 (6th Cir.), *cert. denied*, 429 U.S. 927 (1976), principles of comity prevented the steelworkers from pursuing relief, and in United States Steelworkers Justice Committee v. United States, 553 F.2d 415 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978), their intervention challenge was held untimely.

In the typical voluntary collective bargaining agreement, such as the one Weber has challenged, the employer and the union agree to take certain affirmative action. The impetus for such agreements may be simply the good intentions of the parties, or, as in this case, fear of future litigation and threats from the federal government. Whatever the reason, innocent employees such as Weber have no say in the agreement process and are not technically parties to it.

Likewise, conciliation settlements, or agreements, and consent decrees do not generally include parties with an interest in opposing or limiting the nature and degree of affirmative action. Rather, the disgruntled parties involved, if any, tend to be those who argue that they have not received *enough* relief. The steel industry litigation involving two consent decrees adopted in 1974 is an excellent example of the process at work. *See United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

If innocent employees are not made parties from the very start, they can only defend their interests if they are quick enough to realize what might happen to them before it actually does and seek to intervene before time defeats them.

Realistically, many potential victims of quotas will not act in time to intervene in existing proceedings, whether the proceedings are before a government agency or before a court, since they generally fail to react until the quota implementation has its adverse impact on them. Their failure to intervene will prevent a proper representation of their interests unless the decision makers are constrained by the strict requirement of finding past illegal discrimination and identifying victims before instituting a quota. If the adoption of quotas is so carefully circumscribed, the dangers of creating new victims of quota discrimination will be greatly reduced. Quotas properly used will be strictly remedial and will produce no adverse consequences for anyone.

The approach to quotas which Southeastern urges this Court to adopt is, we believe, the only approach which adequately balances the private settlement theme of Title VII, Title VII's specific prohibition against employment discrimination, the overall purpose of Title VII to guarantee equal employment opportunities for all, and the equitable principles enunciated by this Court in *Teamsters, supra* at 376. Unlike the petitioners, Southeastern does not attach such superior and overriding importance to voluntary settlement as to justify virtually any form of voluntarily adopted affirmative action. However, while quotas must be limited in use and only allowed after certain conditions are met, they are not foreclosed by the approach suggested in this brief.

CONCLUSION

Southeastern respectfully urges this Court to affirm the decision of the Fifth Circuit by holding that quotas may be used only after a factual finding of past illegal discrimination and then only to provide relief to identified victims of the illegal discrimination by placing them, so far as practicable, in their rightful places. This Court is further urged to apply this standard to all entities which might adopt or order the use of quotas.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM 1978

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

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Anderson v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D. Cal. 1972)	25, 27, 36
Associated General Contractors of Massachusetts, Inc. v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974)	15
Brunetti v. *City of Berkeley*, ____ F.Supp. ____, 12 FEP Cases 937, 11 EPD ¶ 10,804 (N. D. Cal. 1975)	25, 27, 36

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Carter v. *Gallagher*, 452 F.2d 315 (8th Cir., en banc, 1971), cert. denied, 406 U.S. 950 (1972)	38
Chance v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), cert. denied sub nom. *Council of Supervisors* v. *Chance*, 431 U.S. 965 (1977)	25, 28
Chmill v. *City of Pittsburgh*, 375 A.2d 841 (Pa. Commonwealth Ct. 1977)	25, 27
In Re City Commission on Human Rights (Community School Board No. 4), No. 40523/75 (Supreme Court, N. Y. County 1975)	43
Contractors Association of Eastern Pennsylvania v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971)	12, 13
Crofts v. *Board of Governors of California County Colleges*, Civil No. 75-337 (N.D. Cal., filed Feb. 18, 1975)	43
Croker v. *Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa. 1977)	32
Detroit Police Officers Ass'n v. *Young*, 446 F.Supp. 979 (E.D. Mich. 1978)	25, 27
E.E.O.C. v. *Local 638 . . . Local 28 of the Sheet Metal Workers' International Ass'n*, 532 F.2d 821 (2d Cir. 1976)	14, 38
E.E.O.C. v. *Mo. Pacific R.R.*, 493 F.2d 71 (8th Cir. 1974)	31
Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976)	42
Fraternal Order of Police v. *City of Dayton*, 35 Ohio App. 2d 196, 301 N.E. 2d 269 (1973)	28
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	5, 9, 26, 28
Harper v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187 (D. Md. 1973), modified on other grounds and affirmed sub nom. *Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973)	42
Hiatt v. *City of Berkeley*, 85 Cal. App.3d 29, 149 Cal.Rptr. 155 (Cal. Ct. App. 1978)	25, 28, 37
Hollander v. *Sears, Roebuck & Co.*, 392 F.Supp. 90 (D. Conn. 1975)	27

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Hull v. *Cason*, 18 FEP Cases 1379 (Calif. Ct. App., Dec. 28, 1978)	33
Hupart v. *Board of Higher Education of the City of New York*, 420 F.Supp. 1087 (S.D.N.Y. 1976)	44
International Ass'n of Firefighters, Local 134 v. *City of Atlanta*, 11 EPD ¶ 10,676 (Ga. Superior Ct., Fulton County 1975)	25
Jackson v. *Poston*, 40 A.D. 2d 19, 337 N.Y.S. 2d 108 (3rd Dep't 1972)	27
Johnson v. *Railway Express Agency*, 421 U.S. 454 (1975)	26
Jones v. *Middendorf*, 454 F.Supp. 1276 (E.D. Okla. 1978)	27
Joyce v. *McCrane*, 320 F.Supp. 1284 (D.N.J. 1970)	15
Kirkland v. *New York State Dep't of Correctional Services*, 520 F.2d 420, rehearing en banc denied, 531 F.2d 5, cert. denied, 429 U.S. 823 (1976)	32, 4
Lige v. *Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976)	33
McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)	26, 28, 29
Mitchell v. *Mid-Continent Spring Co. of Kentucky*, 583 F.2d 275 (6th Cir. 1978)	42
Patterson v. *Newspaper Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975)	41
Regents of the University of California v. *Bakke*, 57 L.Ed. 2d 750 (1978)	8, 39-40
Reitman v. *Mulkey*, 387 U.S. 369 (1967)	25
Reeves v. *Eaves*, 411 F.Supp. 531 (N.D.Ga. 1976)	39
Ruddy v. *Connelie*, 61 A.D.2d 372, 402 N.Y.S. 2d 245 (3d Dep't 1978)	28
Sanchez v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)	31
Scott v. *University of Delaware*, 455 F.Supp. 1102, 17 FEP Cases 1486, 18 EPD ¶ 8783 (D. Dela. 1978), appeal pending (U.S. Ct. App., 3d Cir.)	24
Shelley v. *Kraemer*, 334 U.S. 1 (1948)	24

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Silverman v. *Univ. of Colorado*, 541 P.2d 93, 11 FEP Cases 1462 (1975), reversed, 555 P.2d 1155 (Colo. 1966)	43
Sledge v. *J.P. Stevens & Co.*, ____F.2d____, 18 FEP Cases 261, 18 EPD ¶ 8657 (4th Cir. 1978)	42
Southern Illinois Builders Ass'n v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972)	15
State Dep't of Administration v. *Dep't of Industry, Labor & Human Relations*, 252 N.W.2d 353 (Wisc. Supreme Ct. 1977)	28
Swann v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971)	42
Sweatt v. *Painter*, 339 U.S. 629 (1950)	24
Thorpe v. *Housing Authority of Durham*, 393 U.S. 268 (1969)	27
United States v. *Guest*, 483 U.S. 745 (1966)	25
United States v. *Wood, Wire & Metal Lathers International Union, Local 46*, 471 F.2d 408 (2d Cir. 1973)	40
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975)	25

ADMINISTRATIVE AGENCY DECISIONS

E.E.O.C. Decision No. 74-106, 10 FEP Cases 269, CCH E.E.O.C. Decisions ¶ 6427 (1974)	29
E.E.O.C. Decision No. 75-57, 8 FEP Cases 554, CCH E.E.O.C. Decisions ¶ 6420 (1973)	42
E.E.O.C. Decision No. 75-268, 10 FEP Cases 1502, CCH E.E.O.C. Decisions § 6452 (1975)	29, 43

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Title VII, §701(a), 42 U.S.C. §2000e(a)	14
Title VII, §703(a), 42 U.S.C. §2000e-2(a)	20
Title VII, §703(j), 42 U.S.C. §2000e-2(j)	13
42 U.S.C. §1981	6, 8, 9, 33, 36

FEDERAL EXECUTIVE ORDERS, RULES AND REGULATIONS

Executive Order 11246, 3 C.F.R. 169 (1974)	6, 8, 9, 33,36
41 C.F.R. Part 60-2, "Affirmative Action Programs," (Revised Order No. 4)	11, 12
41 C.F.R. §60-1.2	11
41 C.F.R. §60-2.10	11, 12
41 C.F.R. §60-2.11	12
E.E.O.C. Affirmative Action Guidelines, 44 Fed. Reg. 4421 (1979)	29

OTHER AUTHORITIES

E. Barker (ed.), *The Politics of Aristotle* (Oxford Galaxy 1962)	45
J. Bunzel, "The Quota Mentality," *Freedom at Issue,* Nov.-Dec. 1973	15
E. Cahn, "Law in the Consumer Perspective," 112 *U.Pa.L.Rev.* 1 (1963)	46
E. Cahn, *The Predicament of Democratic Man* (1961)	46
L. Carroll, *Alice's Adventures in Wonderland*	36
"Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 *Harv.L.Rev.* 1109 (1971)	19
P. Drucker, *Management: Tasks, Responsibilities, Practices* (1974)	19
Employment and Training Report of the President, Transmitted to the Congress in 1976 [U.S. Gov't Printing Office Stock No. 02900000254-1]	32

	Page
B.R. Epstein & A. Forster, *Preferential Treatment and Quotas* (Anti-Defamation League of B'nai B'rith pamphlet, 1974)	44
Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations Before the Special Subcommittee on Education of the House Committee on Education and Labor, 93rd Cong., 2d Sess. (1974)	8, 15, 17
Gallup Poll, Press Release, May 1, 1977	44
N. Glazer, *Affirmative Discrimination* (1975)	9
B.R. Gross (ed.), *Reverse Discrimination* (1977)	48
S. Johnson, "It's Action, but Is It Affirmative?" *New York Times Magazine,* May 11, 1975	17
L. Lavinsky, *"DeFunis* v. *Odegaard:* The 'Non-Decision' with a Message," 75 *Colum. L. Rev.* 520 (1975)	41
Los Angeles *Herald-Examiner,* Feb. 20, 1975	43
Measure, No. 37, Jan. 1976	23
P. Nash, "Affirmative Action under Executive Order 11246," 46 *N.Y.U.L.Rev.* 225 (1971)	15, 18, 22
E.W. Patterson, *Jurisprudence* (1953)	45
New York *Post,* July 2, 1975	43
New York *Times,* May 1, 1977	44
Feb. 20, 1979	44
Feb. 21, 1979	44
P. Seabury, "HEW and the Universities," *Commentary,* February 1972, 38	17
M. Sherman, "Affirmative Action and the AAUP," *AAUP* [Amer. Ass'n of University Professors] *Bulletin,* Winter 1975, 293	17
T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976	16, 20, 21,23

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE ON THE MERITS

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

INTEREST OF THE AMICUS CURIAE

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to federal and state legislation relating to civil rights and to fair educational practices, and to the equal protection provisions of the United States Constitution. CANI is an offshoot from University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters toward the re-establishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxy.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country.

It has brought together professionals from every discipline, women and men, blacks and whites, Christians, Jews, and myriad denominations, renowned academics with many years of tenure, and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Sub-Committee, including:

Walter Berns
Bruno Bettelheim
Ruth Bevan
Joseph Bishop, Jr.
Daniel Boorstin
Edgar Borgatta
Paula Sutter Fichtner
Sidney Hook
Erich Isaac
Paul O. Kristeller
Ernest Nagel
Norma L. Newmark
W.V. Quine
Paul Seabury

Milton Friedman
Richard Gardner
Nathan Glazer
Oscar Handlin
Gertrude Himmelfarb
Seymour Siegel
Miro Todorovich
Eugene Wigner
L. Pearce Williams
Cyril Zebot

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-called reverse discrimination against qualified applicants for academic positions in university admissions and employment. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. This material was then used subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance Programs, the Secretary of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare and officials of the Executive Office of the President. Representatives of CANI have testified at congressional hearings and at those held by such agencies as the Equal Employment Opportunity Commission and the United States Commission on Civil Rights. Representations have also been made to various regional units of HEW's Office for Civil Rights, and to local university administrations. Factual materials have also been put at the disposal of interested individual members of Congress. Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert quotas for members of selected racial or ethnic groups, or women, in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements have led them to believe that they would be given

the opportunity to acquire further skill or knowledge, or to use their scholarly abilities, found themselves discriminated against for no other reason than their race, ethnicity or sex.

The question of the constitutionality of the establishment of racial or sex quotas, or of discriminatory preferences for members of selected groups without the establishment of a quota, is clearly of vital importance to members of the Committee.

Deeply concerned by what it has viewed as an erosion of constitutionally guaranteed individual rights—including the right to be free from discrimination based on race, ethnicity and sex—CANI has filed briefs as amicus curiae in a number of significant cases including *Regents* v. *Bakke, Cramer* v. *Virginia Commonwealth University, DiLeo* v. *Regents of the University of Colorado,* et al., and *State of Wisconsin (Department of Administration),* et al., v. *Department of Industry, Labor and Human Relations, John T. Patzer, and Madison Building Trades Council.* In each instance, CANI has, as here, taken the position that all forms of discrimination are Constitutionally impermissible.

QUESTION PRESENTED

Does Federal law, which protects both blacks and whites from discrimination in employment practices, nonetheless permit such discrimination if the perpetrator alleges a motivation rooted in "affirmative action", or in remedying "underutilization," or in remedying prior discrimination against others?

INTRODUCTION

It cannot be questioned that voluntarily instituted reverse discrimination by an employer is flagrantly illegal.[1] Indeed,

[1] Twelve cases so holding are cited at Point IV-A, and some of them are also noted at the end of Point II.

none of the Petitoners was able to cite in its Brief even one case allowing an employer to set up a quota scheme and discriminate against white and/or male employees. On the contrary, numerous cases have struck down such quotas, as this Amicus will document, *infra.* To escape the impact of this indubitable fact the three Petitioners use a variety of arguments seeking to sidestep proper characterization of the real issue in the case, which has been decided against their position, in other cases in the past. This Brief will identify and expose such hypotheses.

This case has arisen because Petitioners have fundamentally refused to acknowledge the basic meaning of our nation's civil rights laws. Those statutes were enacted only after long and bitter struggles in which actual lives were lost—by both blacks and whites, working in the cause of human brotherhood and human rights. The statutes outlawing employment discrimination do not ban merely discrimination against minorities. They flatly forbid such acts against *any* person. In the words of this Court, "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971).

The laws mandate that a person be regarded as an *individual,* not as a member of a particular group to which he or she may belong. Any historic type of discrimination against members of certain groups is not to be used as an excuse for instituting such discrimination against members of other groups. In the present case, Petitioners have failed to realize that non-minority workers do not have a lesser right to be free from discrimination than their minority colleagues possess. Nor do the non-minority employees enjoy a greater right. Rather, they possess the *same* right.

If anything, racial discrimination is more reprehensible today than it was a generation ago, for nowadays there are no excuses left. At that time, attitudes had not yet changed, the law was not nearly as well developed as it is today, and the

essential wrongness of discriminatory acts had not penetrated the minds of key decision makers in American industry. In 1979, it is clear that much progress has been made. Discrimination against minorities is condemned by both law and generally accepted practice in American industry. Where it still occurs, even the perpetrators dare not try to justify it openly, but attempt to give lip service to concepts of brotherhood and civil rights. But where discrimination against non-minorities is suggested as a means of "making up" for discrimination against minorities—or for the general socioeconomic disadvantages that many minority people endure, whether or not they have been specifically discriminated against—the reaction, unfortunately, is often different.

Many employers, and some unions, believe that they should have *carte blanche* to disregard—unilaterally and in their own unreviewable discretion—every legal safeguard that now protects present and prospective employees from discrimination on the grounds of race, color, sex, religion, national origin, or any other characteristic, as long as the employer or union alleges a motivation rooted in "affirmative action" to increase the body count of workers from a particular race or other group.

Thus, what is at stake in this case is whether an individual's legal right to be free from discrimination, and his chances for meaningful, fulfilling employment and a worthwhile career can, in effect, be consigned to the waste heap by the self-serving decisions of employers and unions.

The arguments presented by Petitioners here, and by other perpetrators of such discrimination, are merely special instances of the classic ploy so often used by those who defend discrimination in any form—the idea that the discrimination in question is somehow for the good of society. As will be shown in the argument herein, Petitioners' policies and practices of "reverse discrimination" offend various legal provisions, including the Fifth Amendment, Title VII of the Civil Rights Act of 1964, 42 USC §1981 and Executive Order 11246.

Furthermore, minorities and women themselves (as documented *infra*), can and have been direct victims of reverse discrimination, *i.e.*, discrimination perpetrated against members of *any* group, not for the traditional motives of bigotry, but for "affirmative action" purposes. And, furthermore,

> "There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweigh any temporary gains they might bring.
>
> One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical—and profoundly mistaken—view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes must be given something in order to have something.
>
> Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills, and self discipline."

Testimony of Bayard Rustin and Norman Hill (of the A. Phillip Randolph Institute), *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Part 2A at 253.

Last Term, this Court, weathering a deluge of Briefs, faced the problem posed by a white would-be medical student confronted by an admissions policy which favored non-minority applicants and excluded him from admission. Now, the focus is upon the same concept clothed in employment, as opposed to admissions, terms. While factually inapposite to the *Weber* history of events, many of the reasons set forth in Mr. Justice Powell's opinion explaining why a racially-based two track system in a state medical school's admissions practices was illegal apply also to the instant case, where Kaiser and the Union had set up a two-track system of job selection. *Regents of the University of California* v. *Bakke,* 57 L.Ed. 2d 750, 767-790 (1978).

SUMMARY OF ARGUMENT

This Brief will demonstrate that Petitioners' course of conduct violated 42 USC §1981, Executive Order 11246, Title VII of the Civil Rights Act of 1964, and in the case of the Government, the equal protection guarantees of the Fifth Amendment.

The Brief explains how the idea that outright discrimination is permissible in the name of "affirmative action" destroys not only the valuable concept of affirmative action but also fundamentally contravenes the laws safeguarding civil rights. The harm that reverse discrimination inflicts on minorities and women themselves—both because it stigmatizes them and because they are sometimes the actual victims of preferences carried out in favor of *other* "protected" groups—is made clear.

Two statutes—42 USC §1981 and Title VII of the Civil Rights Act of 1964, as interpreted by the courts and (in the case of Title VII) the Equal Employment Opportunity Commission—outlaw reverse discrimination. Although courts have, in some cases, imposed "remedial" quotas in cases of proven prior discrimination, such decisions do not in any way justify Petitioners' adoption of a quota which inflicted serious harm on plaintiff and his class, simply in order to improve Kaiser's "body count" of minority group craftsmen. The argument that the quota at issue here was a permissible remedy for possible discrimination is shown to rest on a false analogy between the kind of employer conduct ruled illegal in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), and Kaiser's prior employment practices, as well as a distortion of the circumstances that would justify the imposition of a quota even in an actual case of proven employment discrimination.

One semantic note: although this Brief, of necessity, frequently uses the phrase "reverse discrimination," that term is a misnomer, for what it really refers to is one species of discrimination itself, not the reverse of it. Nonetheless, along with "preferential treatment," the phrase must perforce be used for want of a generally accepted better appellation. (Perhaps "Affirmative Discrimination," the title of Professor Nathan Glazer's recent book, is a more accurate name for the phenomenon.)

POINT I: THE QUOTA SCHEME VIOLATED EXECUTIVE ORDER 11246

A. Executive Order 11246 Forbids All Discrimination in Employment by Government Contractors

Kaiser and the Government have tried to justify the reverse discrimination here under Presidential Executive Order 11246, as amended, 3 CFR 169 (1974), reprinted following 42 USC §2000e. The Executive Order requires that Federal contractors explicitly promise (by means of a mandatory clause in each contract) to (1) refrain from employment dis-

crimination and (2) to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Section 202(1).

This Amicus, as an organization strongly devoted to the eradication of discrimination, regards the Executive Order, which is the latest in a succession of such orders originating in the administration of Franklin D. Roosevelt in 1941, as a significant and substantial step forward in overcoming discrimination.

Precisely for that reason, this Amicus believes that firm corrective action must be taken now that the Government's "implementing" regulations have distorted the affirmative action obligation into a program of preferential treatment for members of selected groups, thus discriminating against innocent members of other groups.

It must be emphasized that not only does the Executive Order's basic outlawing of discrimination prohibit the conduct that took place here (by forbidding discrimination by the contractor "against any employee or applicant for employment because of race, color, religion, sex, or national origin. . ."), but, the very heart of the affirmative action obligation imposed by the Order, as quoted above, addressed itself to eliminating any vestiges of racial discrimination.

Indeed, it would be necessary for Kaiser, if it is truly to comply with the strictures of the Executive Order, to engage in a program of *affirmative action against the reverse discrimination it has perpetrated,* by dismantling its quotas and guaranteeing *all* potential candidates for its craft training programs that their race will not be held against them.

(It should be noted that the Court below erred in lumping together the Executive Order itself with certain regulations promulgated by the Department of Labor that supposedly implement the Executive Order, and in branding the Executive

Order itself as possibly illegal. 563 F.2d at 227. The regulations in question, confusingly, also contain the word "order" in their title; they are known as "Revised Order No. 4." It is those regulations which this Amicus believes are illegal [and *not* the Executive Order]; they call for the numerical goals which the Court below correctly termed indistinguishable from quotas. 563 F.2d at 222. We feel that while this error must of course be corrected by this Court, it does not in any way vitiate the force or correctness of the decision below.)

B. The Regulations Issued Supposedly to Implement the Executive Order Mandate Illegal Quotas

To clarify the nature of the regulatory scheme involved here, it should be explained that the Executive Order, in §201, delegates responsibility for enforcement to the Secretary of Labor. He, in turn, has delegated most enforcement duties to the Office of Federal Contract Compliance Programs (OFCCP) within the Department. 41 C.F.R. §60-1.2.

The Secretary of Labor has issued regulations for implementation of the Executive Order by non-construction contractors. 41 C.F.R. Part 60-2, "Affirmative Action Programs" (officially known as "Revised Order No. 4," and hereinafter cited as "R.O. 4"). These regulations require, among other measures, that employees perform a "utilization analysis" with respect to existing and potential minority and female representation in their work forces, and set numerical "goals and timetables" for hiring and promotion to overcome any "underutilization" found to exist. 41 C.F.R. §60-2.10. Goals are set by the employer subject to review by the appropriate compliance agency, after the employer has performed a "utilization analysis" with respect to women and minorities in his existing work force, the minority and female populations in the areas from which he can recruit, and the portions of those populations possessing the requisite skills and knowledge for employment in his organization. Also to be considered are how many women and minorities are employed in the local area,

and the availability of actual and potential training opportunities both in the community and within his own organization. 41 C.F.R. §60-2.11.

Each instance of "underutilization" must be explained. This word is defined as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability." *Id.* R.O. 4 states that in addition to the utilization analysis, "an acceptable affirmative action program must include. . .goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies [*i.e.*, any instances of underutilization found] and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist." 41 C.F.R. §60-2.10.

(In the present case, it would seem that Kaiser was *not* underutilizing minorities as craft workers, since it had hired every minority craftsman it could find. There were no unemployed black craftsmen in the area from whom Kaiser could recruit employees, evidently because the few qualified blacks had all been hired by other employers, whether or not under preferential quota schemes. Union's Brief, 11. [Indeed, this is also one of the reasons why Kaiser could not have been found guilty of violating Title VII by not employing more black craftsmen, since there were no unemployed black craftsmen on whom it could draw.] Thus Kaiser would not have had to set goals for employing minority craftsmen.)

Kaiser and the Government raise some confusion citing decisions such as *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971). In no way does that line of cases constitute authority for the blatant discrimination here. The numerical goals upheld by *Contractors Association* had been imposed under Executive Order 11246 in a situation replete with prior discrimination by the six construction unions involved, which had excluded blacks. 442 F.2d at 173.

Furthermore, the goals, according to the court, could be met "without adverse effects on the existing labor force" which was essentially transitory and often in short supply for key trades. *Id.* at 176. Not only was no preferential treatment authorized or required under the so-called "Philadelphia Plan," but the Plan itself provided that any discriminatory usage of numerical goals was to be the subject of sanctions by the Department of Labor. *Id.* at 164. As the Plan puts it, "[t]his commitment [to establish and meet goals] is not intended and shall not be used to discriminate against any qualified applicant or employee." *Id.*

To repeat, the goals, according to the court, could be met "without adverse effects on the existing labor force" which was essentially transitory and often in short supply for key trades. *Id.* at 176. But does such a situation exist—*can* it exist—whenever goals are set in diverse job fields other than construction? Certainly, in university employment, the demand for employment far outstrips the number of available posts.

Sec. 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), which bans preferential treatment to correct alleged "imbalances" in employment figures, has been rejected by some courts as a bar to the establishment of "goals" under the various "construction worker plans," whether Federally or state-imposed. See, *e.g., Contractors Ass'n., supra,* 442 F.2d at 172.

However, no case[2] thus far has dealt with the application of §703(j) to a situation involving "goals" for non-fungible workers, and where preferential treatment is bound to occur for reasons that the Third Circuit panel in *Contractors Ass'n* expressly found to be absent in the particular situation before it. Furthermore, some members of the Second Circuit Court of Appeals bench believe that this section may well circumscribe the courts' own powers to remedy proven discrimination, which would seem to be broader than the Executive's power to require "goals" for "underutilization." *See* Feinberg, Cir. J., concurring

[2] See decision below, 563 F.2d at 219.

in *E.E.O.C.* v. *Local 638... Local 28 of the Sheet Metal Workers' International Ass'n,* 532 F.2d 821 (2d Cir. 1976), at 833-34, citing prior opinions by Hays, Cir. J., and himself. Indeed, Judge Feinberg suggests that §703(j) bars remedial quotas in cases of proven blatant discrimination, even those quotas set under the strict *Kirkland* standards (discussed *infra*) *Id.*

This is a far cry from the assertion in *Contractors Ass'n* that §703(j) does not bar goals since that section applies only to Title VII and does not limit other Federal remedies under such programs as those based on Executive Order 11246. 442 F.2d at 172. The court failed to realize that the Executive Order does not and cannot require or authorize an employer to breach statutory law, nor can the Labor Department acting thereunder. However, since *Contractors Ass'n* found that no preferential treatment was authorized or required under the Philadelphia Plan, and indeed that reverse discrimination would not occur in implementing the Plan, this conclusion with regard to §703(j) is really a dictum.

While the *Contractors Ass'n* line of cases has indeed emphasized that the Executive in some ways has wider powers than the courts to remedy proven discrimination, it must be remembered that in the case of Federal contractors, goals are required not to correct prior discrimination, but to halt "underutilization," a meaningless status whose existence is determined by an absurd and arbitrary statistical exercise. Thus, §703(j) might well bar a blanket requirement of goals for Federal contractors that "underutilize" minorities or women. In any event though, the Act's prohibition of discrimination, §703(a), 42 U.S.C. 2000e-2(a), standing alone, is a fully effective bulwark against reverse discrimination because it outlaws *all* discrimination in any term, condition, or privilege of employment.

Similar considerations apply to other cases upholding state-imposed construction worker plans modeled on the Federal effort in Philadelphia, such as *Associated General Contractors*

v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); and *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D.N.J. 1970).

Although the numerical goals upheld in *Contractors Association* were imposed on employers who had not themselves discriminated, that is only to be expected in the construction industry, where workers are chosen through union hiring halls that service employers (who do not themselves routinely screen those referred to them). P. Nash, "Affirmative Action under Executive Order 11246," 46 *N.Y.U.L. Rev.* 225, 232 (1971). The employers were thus in privity with the unions, even though the former had not joined in the discrimination committed by the latter.

C. The Experience of Colleges and Universities Exemplifies the Bitter Harvest from the Maladministration of Executive Order 11246

Higher education, of course, has traditionally—along with other institutions in American life—shown in its faculty employment patterns the effect of our country's socioeconomic problems. To an unknown extent, however, these patterns also indicate results of personal preference and individual choices as to lifestyles among specific population groups. That is, it is not necessarily true that any statistical distribution of various population groupings in higher educational faculty employment is caused by employment discrimination by colleges and universities. Rather, it may be an indirect result of discrimination in some other aspect of society, or may simply stem from still other factors contributing to occupational choice and mobility, including those having nothing to do with bigotry or mistreatment. *See, e.g.,* J.H. Bunzel, "The Quota Mentality," *Freedom at Issue,* Nov.-Dec. 1973, reprinted in *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Part 2B, 1172, at 1176-78.

Be that as it may, however, a major emphasis in the Executive Order enforcement policies of the Government has been directed toward higher education. Although the Department of Labor recently has now received all contract compliance duties under the recent Presidential Civil Rights Reorganization, it was the Department of Health, Education, and Welfare that originally had that responsibility, which was handled by HEW's Office for Civil Rights (OCR).

(The recent changeover to direct Labor Department control of the compliance process may lead to even worse abuses than OCR has perpetrated, since OFCCP is controlled by industry-oriented administrators even less conversant with education-related matters than their counterparts, and who tend to take an even harder, more "fundamentalist", line toward setting and enforcing goals.)

A spate of articles protesting HEW's overreaching in this role began appearing in academic publications as well as the popular media after 1970, but OCR only intensified its efforts.

Certainly it would appear that priorities may have been misplaced, especially since the need for much of this effort was, at best, dubious—and its results have been largely negative. *See generally,* T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47.

Despite the university officials' feelings about the Federal regulatory efforts, however, their institutions stood to lose a great deal if found in noncompliance, and this factor may have accounted for much of their reticence with respect to resisting HEW in a spirited manner. Consider, for example, these statistics on the universities' stake in payments under Federal contracts for research and other purposes:

> "As early as 1967, the federal government was annually disbursing contract funds to universities at the rate of three-and-a-half billion dollars a year; recently the Carnegie Commission suggested that federal contract funding be increased by 1978 to

> thirteen billion dollars, if universities are to meet their educational objectives. Individual institutions, notably great and distinguished ones, already are extraordinarily dependent on continuing receipt of federal support. The University of California, for instance, currently (1970-71) depends on federal contract funds for approximately $72 million. The University of Michigan, periodically harassed by HEW threats of contract suspension, cancellation, or nonrenewal would stand to lose as much as $60 million per annum. The threat of permanent disqualification, if consummated, could wholly wreck a university's prospects for the future."
>
> P. Seabury, "HEW and the Universities," *Commentary,* Feb. 1972, 38, at 39.

In view of this, it is understandable why, for example, the University of Michigan alone spent $350,000 in gathering various statistics necessary to satisfy HEW. T. Sowell, *supra,* at 57.

And it is also understandable that the universities were under great pressure to satisfy HEW by committing reverse discrimination, to raise their "body counts" of minority and female faculty.

For a wide-ranging investigation, including a good collection of hard-to-find source materials, see *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations Before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Parts 2A and 2B (2 volumes), especially the articles by E.F. Borgatta, J.H. Bunzel, R. Gambino, B. Lorch and P. Seabury; and see also S. Johnson, "It's Action, But Is It Affirmative?" *New York Times Magazine,* May 11, 1975, 18 (concerning the efforts of HEW to impose its goal-quotas on the University of California at Berkeley), and M. Sherman, "Affirmative Action and the AAUP," *AAUP* [Amer. Ass'n of University Professors] *Bulletin,* Winter 1975, 293.

The next sub-point will demonstrate, using higher education as the prime (but not exclusive) example, that "goals" are inherently illegal quotas.

D. "Goals" Are Quotas

The idea of numerical goals for increases in minority and female employment was not originally postulated as part of the affirmative action concept. It was first used by the Labor Department in the famous "Philadelphia Plan" for minority hiring in the construction trades, but was later extended to non-construction contractors by R.O. 4. *See* P. Nash, "Affirmative Action under Executive Order 11246," 46 *N.Y.U. L. Rev.* 225 (1971).

From the start of these efforts, a frequent criticism has been that the goals were really quotas. See, for example, decision below, 563 F.2d at 222, n.10 and accompanying text.

Once set, these quotas are to be striven for, despite being nothing but sheer arbitrary guesswork. The very threat of sanctions being applied if the figures are not met—regardless of how patiently the Government listens to explanations of *why* they are not met—is of course the most effective means of enforcing the quotas (especially since the sanctions can include severe delay or loss of millions of dollars in contract funds).

> "Even if an employer were in theory permitted to demonstrate that he had not discriminated, and that he had undertaken affirmative action although his employment figures were inadequate, the practicalities of proof might mean that statistical shortcomings are all but impossible to rebut. Indeed, even if actual litigation does demonstrate that the inference from statistical inadequacy can be overcome, employers may *believe* that the statistics will operate conclusively, that sanctions may attach, and that it is therefore safer simply to steer clear of trouble and meet the figures agreed upon through 'preferential' hiring".
>
> Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 *Harv. L. Rev.* 1109, 1302 (1971).

Nonetheless, however, the proponents of numerical goals, by asserting the palpable lie that goals are really different from quotas, and by repeating it long enough and loudly enough, have drowned out all the opposition that might arise from even a cursory glance at any dictionary's definition of the word "goal." The obvious contradiction in terms between deliberate efforts to reach a goal in employment or promotion—that is, a specific body count in terms of group identification—and efforts not to discriminate is ignored. Surely, however, everyone with a minimal education should know that the word "goal" means an "objective." Operating under a non-discriminatory personnel selection system is basically incompatible with trying to reach, as an "objective," a previously set numerical distribution of the race, ethnicity and sex of those selected.

In fact, the Government's use of "goals" entails a perversion of the widely-accepted concept called "management by objectives." Managers in industry, and—increasingly —administrators of universities and colleges, are accustomed to thinking of "goals" as organizational objectives which they themselves help to set and which then *must* be obtained. See, *e.g.*, P. Drucker, *Management: Tasks, Responsibilities, Practices* 430-42 (1974). "Management by objectives" (often abbreviated "MBO") originated in the business world but is rapidly spreading to non-profit institutions and is now even encountered in such fields as prison administration.

The use of the term "goals" is entirely proper and appropriate in MBO programs, which seek to impose concrete and, where possible, quantifiable objectives to be reached in running an organization or developing an enterprise. Indeed, some aspects of promoting equal opportunity might well lend themselves to being crystallized and implemented by this approach. However, it is clearly illegal to regard as a management goal or objective the selection of a specific absolute number or per-

centage of persons from given groups for any job, position, award or other status. This is because the law mandates that there be no discrimination whatever in the making of such choices; if there is to be no discrimination, the decision-maker cannot possibly know in advance, *nor should he attempt to estimate,* the numbers of persons from various population groups to be selected. If he tries to reach a particular number, he will be discriminating, for, to reiterate, the idea of *non-discrimination is fundamentally contradictory to the idea of achieving a particular "body count" as a "goal."*

Furthermore, even the existence of such an estimate (including one that merely purports to be an approximation of what would be accomplished under non-discriminatory selection, with only legitimate and proper affirmative action used) is inherently discriminatory. It will have a "chilling effect" on non-discriminatory selection (especially by subordinate managers afraid to displease their superiors) and also on applications by non-minority persons and males, who will understandably develop a "what's the use?" attitude.

For these reasons, the voluntary variety of goal-setting by employers would seem to be illegal, just as avowed quotas are. For it to be mandated by Government regulations, with the "goals" themselves enforced by threat of drastic sanctions, would seem to be flagrantly unconstitutional. Whether voluntary or mandated, the creation and administration of goals would seem to violate §703(a)(2) of Title VII, 42 U.S.C. §2000e-2(a)(2), which states that an employer may not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities. . ." on the basis of race, sex, etc.

All this is most ironic, as well as illegal. See T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47.

Indeed, as Professor Sowell (who is black) demonstrates,

> (a) Underutilization, insofar as it exists, stems not from employer discrimination but from a dearth of qualified minority and female academics. *Id.* at 55-59, *passim.*
>
> (b) While blacks and women are "underrepresented" in academe in comparison with their proportion in the general population, they are *over*-represented in academe in comparison to the proportion of Ph.D.s they hold. Women hold only 10% of the Ph.D.s but comprise over 20% of the academics. Blacks hold less than 1% of the Ph.D.s but are more than 2% of academics. *Id.* at 55.
>
> (c) Minorities and women made most of their progress in the academic world *before* goals and timetables were applied. *Id.* at 64.
>
> (d) To the extent that the so-called elitist and exclusionary "old-boy network" of Ph.D. alumni from highly prestigious institutions really exists, at least as high a percentage of black and female Ph.D.s as white male Ph.D.s hold their degrees from these top-rated universities. *Id.* at 60.

Furthermore, the idea of numerical goals was formulated with respect to construction work jobs, for which qualifications are (1) standardized, (2) objectively measurable, (3) possessed by a relatively large number of persons, and (4) relatively unimportant over the minimum degree of qualification, so that any "qualified" candidate can satisfactorily fill the position.

In contrast, the qualifications for university faculty positions are (1) decidely non-standardized, (2) subjective in nature, (3) possessed by a very small number of persons and (4) the degree of qualifications over the minimum is vitally important; not just any "qualified" candidate, but only the *best-*

qualified candidate can satisfactorily fill the position. In other words, university professors, and university faculty positions, are most definitely non-fungible.

In order to set a goal, a university department (or any other employer) has to predict with yearly timetables (1) the number of openings that will become available to it over the next three to five years, (2) how many "minority" persons and women will be minimally qualified even to be *considered* for such openings at a particular future time, (3) how many of such persons will actually apply for each such job, (4) how many of the persons described under point (3) *would be better qualified than any other candidate* for the jobs in question and thus would merit and receive job offers from the department, and (5) how many of the persons described in point (4) would accept these offers. This is clearly so superficial and tenuous an exercise in approximation as to be completely absurd.

In the cases upholding numerical goals imposed under Executive Order 11246, the programs in question dealt only with fungible employees, *and* with only one category of those: construction workers. (It should be noted that any one who has ever complained about the way buildings are "put up" nowadays might well want to question the assumption that one construction tradesman is interchangeable with the next—a supposition based on the notion that all master craftsmen in the same craft are equally proficient. But the exploration of that concept is beyond the scope of this Brief.)

For these purposes, it suffices to note that one can presume the fungibility of construction workers inasmuch as the industry itself does so. Although merit tests may be applied in deciding whether one is to be certified as skillful in a certain craft, it is routine for a contractor to put in a call to a union hiring hall for the number and type of workers needed. The contractor does not routinely screen those who are referred to him. And the hiring halls refer workers on a seniority or experience basis. P. Nash, *supra,* at 232. Thus, there is no real selection process by the employer, and fungibility can therefore be said to exist.

This, though, is *not* true in such fields as maintenance or clerical work; and whereas all professional, technical, and executive workers are, almost by definition, non-fungible, professors are even more so—in ways that fundamentally relate to the nature of scholarship, research and university-level teaching.

Consider, for example, that in seeking out prospective new faculty members, department chairmen are *not* looking for those whose "job skills" match those of the current faculty. This is in sharp contrast with "normal" employment practices and with the concepts underlying R.O.4. In most cases, it is a *unique* person who is sought—one whose skills, interests and areas of competence are different in specific ways from those of the present staff. Such factors must be considered if scholarly and research "strengths" are to be built up (or maintained) in a department—experts in different areas and with different approaches are needed. One thus has still another reason why the level and accuracy of prediction necessary to set goals for faculty hiring and promotion would be impossible, even if it were possible in other "professional" fields—there is no "standardized" conception of just what kind of person is needed. *See* T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47, at 59.

Such "problems" are inherent in higher education because of its very nature. A professor, while he may have some surface similarities with elementary and secondary school teachers, is, however, charged not with "pass[ing] on existing learning without interfering with it in any way, but [with being] an interpreter, reviser, and even creator of the very knowledge he or she passes on." Editorial, *Measure,* No. 37, Jan. 1976, 1, at 4.

It must also be noted that in the academic world, with most of the few qualified minority persons already ensconced in jobs, the pressure to achieve goals leads inevitably to a game of "musical chairs," with each institution trying to "raid" others for minority faculty by offering even higher salaries and more perquisites—far more than an equivalent non-minority profes-

sor would receive. This is of course illegal—it is really reverse discrimination in employee compensation. It is the norm, however. See, *e.g., Scott* v. *University of Delaware,* 455 F.Supp. 1102, 1110, 17 FEP Cases 1486, at 1493-4, 18 EPD ¶8783, at pp. 5201-2 (D. Dela. 1978), *appeal pending* (U.S. Ct. App., 3d Cir.).

POINT II: THE QUOTA SCHEME VIOLATED THE FIFTH AMENDMENT

Government pressure has coerced many employers to create quota schemes, in order to satisfy contract compliance officers and retain lucrative Federal contracts. In the instant case, it is clear that Government pressure virtually forced a conspiracy between Kaiser and the Union to satisfy the Government by inflicting very real harm on innocent third parties. Union's Brief, 8; Kaiser's Brief, 4, 5, 18-9, 50; Government Brief, 11. (Even though it was not a Federal contractor, the compliance officers were able to pressure the Union, too. Executive Order 11246, §§203(c), (d); 207.)

Such coercive Federal tactics resulting directly in the infringement of individual rights violated the Equal Protection guarantees of the Fifth Amendment, for despite the Government's evident view that the desirability of raising the "body count" of minority and female gross employment statistics outweighs other individuals' rights to be free from discrimination, numerous decisions of this Court have held equal protection rights to be personal and individual in nature and *not based in group membership.* Among such cases are *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948), and *Sweatt* v. *Painter,* 339 U.S. 629, 635 (1950). Thus, every individual has an *equal* right to be free from discrimination.

To enforce the Government's quotas, employers (and unions too) violate Federal civil rights law, and the Government knows and intends this. In trying to meet goals, employers (as did Kaiser here) intentionally discriminate, and this is

inevitable in view of the kind of psychological and legal pressures goals exert upon them, inasmuch as discrimination is the only way of attaining these arbitrarily-set figures.

The intent to commit such discrimination can be imputed to any state or Federal governmental agency which brought it about. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 169 (1970). The involvement of government need not be "either exclusive or direct". *United States* v. *Guest,* 383 U.S. 745, 755 (1965). Even if the discrimination is merely authorized or encouraged by the government, rather than commanded, it is still deemed discriminatory governmental action. *Reitman* v. *Mulkey,* 387 U.S. 369, 375-76, 381 (1967). Incitement and coercion of discrimination by Federal agencies violates the Due Process Clause of the Fifth Amendment to the same extent that equivalent action by state agencies violates the Fourteenth Amendment guarantee of equal protection. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975).

Assuming, *arguendo,* that an additional link in the chain is required to show Government involvement in forcing discriminatory selection, this Court may infer it from the well-known doctrine that one will be deemed to have intended what he knew or should have known to be the inevitable (or even highly probable) consequences of his action.

Therefore, the Government's actions in this case violate the Fifth Amendment.

Indeed, *at least seven* of the decisions which have struck down reverse discrimination against state and local government employees have rested on Fourteenth Amendment equal protection grounds, in whole or in part. These cases, all fully cited at Point IV-A, *infra,* include *Anderson; Brunetti; Hiatt; Int'l Assn. of Firefighters; Chmill; Detroit Police Officers Ass'n;* and *Chance.*

POINT III: THE QUOTA SCHEME FLAGRANTLY VIOLATED WEBER'S RIGHTS UNDER 42 USC § 1981

Although, as mentioned in Weber's Brief in Opposition to Certiorari, at 7, Weber originally sued on the basis of 42 USC §1981 as well as Title VII, neither the District Court nor the Court of Appeals decisions below discussed §1981. However, it would seem that §1981 is by itself dispositive of this case. It possesses the distinct advantage of not being open to the kind of obfuscation that Kaiser, the Union and the Government have been able to heap on the Title VII aspects of the litigation. The false analogies that those parties have been able to derive by dragging in such matters as the fact that courts sometimes impose quotas in cases of proven prior discrimination, the preference for voluntary compliance as a device for settling Title VII claims, and the "adverse impact" doctrine of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), are not really available to them in a §1981 context.

The statute reads in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens...."

Four years ago, this Court unanimously ruled that §1981, derived from The Civil Rights Act of 1870, prohibits racial discrimination in private employment. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975).

Subsequently, the Court held that §1981 protects whites as well as blacks from racial discrimination in employment. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 286-7 (1976).

While that case of reverse discrimination did not arise in an affirmative action context, a Federal district court had previously held that a white student who had been refused

consideration for a position in a large firm's Summer Internship Program for minority students had a valid cause of action under §1981. *Hollander* v. *Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn. 1975).[3]

Thus, this Amicus submits that §1981 expressly bans the discrimination practiced by Petitioners against Mr. Weber and his class.

Section 1981, as interpreted by *McDonald*, applies to this case even though *McDonald* was decided after the District Court decision in this case was rendered. An appellate court applies the law in effect at the time it decides the case, even if the law has changed since a decision below. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281 (1969).

POINT IV: PETITIONERS' COURSE OF CONDUCT CLEARLY AND FLAGRANTLY VIOLATED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Title VII Outlaws Voluntary Preferences for Members of Selected Minority Groups

Several cases have struck down voluntarily-instituted schemes to preferentially hire or promote minority group persons (or women), on the grounds that such action violated the rights of non-minorities (and men) under Title VII. Among these decisions are *Anderson* v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D. Cal. 1972); *Brunetti* v. *City of Berkeley*, ____F.Supp.____, 12 FEP Cases 937, 11 EPD ¶10, 804 (N.D. Cal. 1975); *Jones* v. *Middendorf*, 454 F.Supp. 1276 (E.D. Okla. 1978); *Detroit Police Officers Ass'n* v. *Young*, 446 F.Supp. 979 (E.D. Mich. 1978); *Jackson* v. *Poston*, 40 A.D.2d 19, 337 N.Y.S.2d 108, 5 FEP Cases 283, 5 EPD ¶8025 (3d Dep't 1972); *Chmill* v. *City of Pittsburgh*, 375 A.2d 841 (Pa.

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[3] To be distinguished from that Court's subsequent ruling, after submissions in lieu of a trial, that plaintiff was in fact not harmed. 450 F.Supp. 496 (1978).

Comonwealth Ct. 1977); *Hiatt* v. *City of Berkeley,* 85 Cal. App.3d 29, 149 Cal.Rptr. 155 (Cal.Ct. App. 1978).

These decisions, it would seem, fill up any lacunae remaining after this Court handed down its unanimous holding that Title VII protects whites as well as blacks. *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976). (Although it involved reverse discrimination, that case had not arisen in an affirmative action context.)

Other cases invalidating reverse discrimination in employment, but not on Title VII grounds, include *State Dept. of Administration* v. *Dept. of Industry, Labor & Human Relations,* 252 N.W.2d 353 (Wisc. Supreme Ct. 1977); *Ruddy* v. *Connelie,* 61 A.D.2d 372, 402 N.Y.S. 2d 245 (3d Dep't 1978); and *Fraternal Order of Police* v. *City of Dayton,* 35 Ohio App.2d 196, 301 N.E. 2d 269 (1973).

Also of great relevance is *Chance* v. *Board of Examiners,* 534 F.2d 993, 998-9 (2d Cir. 1976), *cert. denied sub nom. Council of Supervisors & Administrators* v. *Chance,* 431 U.S. 965 (1977). This decision struck down blatant reverse discrimination concerning seniority benefits (as does the instant case), although in the context of layoffs, rather than hiring or promotion.

B. The Decisional Administrative Interpretation of Title VII by the Equal Employment Opportunity Commission Forbids Voluntary Preferences on the Basis of Race or Sex

The general rule that an administrative agency's interpretation of a statute which it administers is entitled to great deference from the courts has been strongly adhered to by this Court with respect to Title VII and its enforcement by the Equal Employment Opportunity Commission. *Griggs* v. *Duke Power Company,* 401 U.S. 424, 433-34 (1971). It is therefore of great importance in the disposition of the present case to look carefully at what E.E.O.C. decisions have held with respect to

preferences instituted voluntarily by employers to favor minority group members in selective processes such as promotion.

In at least two decisions, the Commission has held that such preferences violate Title VII. E.E.O.C. Decision No. 75-268, 10 FEP Cases 1502, 1503-04, CCH E.E.O.C. Decisions ¶6452 (1975); E.E.O.C. Decision No. 74-106, 10 FEP Cases 269, CCH E.E.O.C. Decisions ¶6427 (1974).

These decisions explicitly reject reverse discrimination, making it clear that such practices are as illegal as discrimination against women or minorities.

Indeed, ironically, in Decision No. 75-268, the charging party, a white person who was the victim of reverse discrimination on the grounds of race, was a woman. Thus it is seen once again that the victims of reverse discrimination are not limited to the male sex, and that members of groups which have been the traditional targets of prejudice and bigotry can find themselves hurt anew by the overreaching of those who have appointed themselves as "philosopher-kings" with the wisdom and the power to suspend all the laws and constitutional provisions against employment discrimination and substitute their own discretion.

It would seem that the precedential value of these two decisions is not vitiated by the recent issuance of EEOC's Affirmative Action Guidelines, 44 Fed. Reg. 4421 (1979), which purport to authorize the institution of quota schemes by employers.

C. The Impact of this Court's Decision in *McDonald* Cannot be Undone by a Mere Resort to the Phrase "Affirmative Action," in a Self-serving Context

The argument presented by the Union is premised upon the notion that the decision of this Court in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), can be cast aside merely by the Union's enunciation of the magic words "affirmative action." Union's Brief, 23.

The Union points to a footnote in the *McDonald* decision stating that the case did not deal with the "permissibility of such a program" (*i.e.*, an affirmative action program), "whether judicially required or otherwise prompted." 427 U.S. at 281 n.8. Although this Amicus can cite numerous other court decisions which do deal with such programs, and which strike down quotas and reverse discrimination,[4] we also point out that what Kaiser and the Union entered into in the present case was not a bona fide affirmative action program, but rather a conspiratorial, self-serving effort to avoid law suits, possible liability, and pressure from the Government, at the expense of innocent third parties. Although this Amicus believes that the responsibility for creating such a situation is that of the Government, which exerted unlawful pressure on the Union and which continues to do so on employers throughout the country, the co-conspirators which actually entered into the quota scheme at issue here cannot completely escape accountability.

The Union attempts to convince the Court that despite *McDonald,* the intent of Congress in enacting Title VII was that unions and employers, while they could not be forced to adopt quotas, either by the Executive Branch or by the courts, would be free to adopt them voluntarily. Of course, such quotas would be permissible only if they discriminated against white males, rather than (say) blacks; the Union is maintaining that a double standard exists under Title VII, whereby white male

[4] See cases discussed *supra* at Point IV-A.

workers do not have the right to be free from discrimination although blacks do. We note that the Union does not maintain that the quotas it defends were adopted to remedy prior discrimination. Rather, it says, they were adopted to "eliminate racial imbalance." Union's Brief, 21 & 73. Because the "body count" of black workers is not what the Union might want it to be, white workers are to be subjected to discrimination on a grand scale to fix up the statistics. The Union argues that this is what Congress intended when it enacted Title VII.

The Union sets forth a lengthy analysis of the legislative history of Title VII. However, this is of limited usefulness, since "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455, 460 (5th Cir., 1970), quoted approvingly in *E.E.O.C.* v. *Mo. Pacific R.R.,* 493 F.2d 71, 74 (8th Cir., 1974). This Court has, however, unanimously endorsed the analysis of that legislative history contained in Mr. Justice Marshall's opinion in *McDonald,* and this Amicus will not attempt to embellish that exposition, which—unlike the views put forth by the Union—is consistent with the statutory language that outlaws discrimination against all persons.

D. The Entire Question is Misconstrued and Wrongfully Characterized by the Petitioners

Petitioners try to show that the voluntarily-adopted quota was justified, despite the lack of a court order or even a finding that discrimination had occurred.

Their argument is rooted in some fundamental distortion of both fact and law.

First,

> "... Title VII does not require that an employer's workforce be racially balanced in all areas. Underutilization in some categories and overutilization in others is to be expected, and does not necessarily demonstrate discrimination."

Croker v. *Boeing Co.*, 437 F.Supp. 1138, 1185 (E.D.Pa. 1977).

Second, it is not true that whatever amount of discrimination may exist in the building construction trades totally handicapped Kaiser's pre-1974 minority workers from acquiring the experience necessary to enter Kaiser's pre-1974 training programs. In carpentry, painting and general repair (the specialties covered by the pre-1974 training program), many craftsmen can and do obtain experience by working in a non-construction field such as maintenance (from which minorities are not barred). Employment and Training Report of the President, Transmitted to the Congress in 1976 [U.S. Gov't Printing Office Stock No. 02900000254-1], at 73-74, 76.

Third, even if, *arguendo*, a Title VII violation could be said to exist, in view of Kaiser's former prior experience requirement for craft jobs, a quota should not be imposed in a case like this even by a court. Such discrimination, if it were found to have existed, would not have been deliberate and willful. Instead, it would have been rooted in "adverse effect" without "business necessity"—the kind of unintentional breach of the law proscribed by *Griggs*. A court in such a case should not impose a quota remedy.

At least one Court of Appeals has denied quota relief for identified individual victims of such "unintentional" discrimination, because neither of two prerequisites had been met. There had not been a "clear-cut pattern of long-continued and egregious racial discrimination." Second, the effect of the reverse discrimination stemming from the proposed court-ordered quota would not have been "unidentifiable," *i.e.*, such effects would have been visited on a relatively small ascertainable group of non-minority individual whites, instead of on the public at large. *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427, *rehearing denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). Applying the *Kirkland* test to the present case, it is clear that quota relief should be denied since the hypothetical discrimination under discussion was unintentional, and the harmful results of the quota would indeed be focused on an ascertainable group—Mr. Weber and his class.

A subsequent decision by the Supreme Court of New Jersey firmly upholds the same principle. *Lige* v. *Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976).[5]

Actually, far from being the victims of discrimination, Kaiser's minority employees are, in many cases, the *beneficiaries* of discrimination. Kaiser admits that since 1969, initial hiring at the plant has been carried out on a "50-50 minority—non-minority basis." Kaiser's Brief, 3 & n.1. Although not a subject of litigation here, that quota is surely a violation of both 42 USC §1981 and Title VII. It is also a violation of Executive Order 11246, even though such hiring was allegedly instituted "as a result of the 'recommendations' of a compliance officer." *Id.* Although this quota was not litigated in the instant case, its existence shows that the minority employees have already received unfair preferential treatment. Since the proportion of minorities in the local workforce is 39% (Union's Brief, 13), a 50% quota for hiring minority workers accords them even more than proportional representation in the plant's ranks, and has a serious impact on the 61% of the local work force composed of non-minorities.

It is thus clear that the only violations of Title VII (and 42 USC §1981) that actually exist on these facts were and are being committed either unilaterally by Kaiser or jointly by Kaiser and the Union—in favor of minority applicants and workers, and against non-minorities.

Kaiser's Brief (at 23-27) refers repeatedly to the preference for "voluntary compliance" with Title VII by employers and unions. However, this of course begs the question, since the issue before the Court is whether what Kaiser and the

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[5] Accord, *Hull* v. *Cason*, 18 FEP Cases 1379 (Calif. Ct. App. Dec. 28, 1978) (Oakland Fire Dep't).

Union did here constituted compliance with the statute, or rather constituted a violation of it. What they actually did was "volunteer away" the rights of third parties like Mr. Weber.

The Briefs of Kaiser and the Government often refer to the use of "race conscious" steps as a correct description for what was done in this case. But that phrase seems deliberately ambiguous. Certain "race conscious" action would be quite permissible. (An example would be advertising for workers in a newspaper oriented toward the minority community, as well as advertising in the general press.) By lumping such innocuous activities together with measures that discriminate against non-minority employees, however, these Petitioners further manage to confuse issues.

All three Petitioners point proudly to the elimination of the prior experience requirement for craft jobs at the time the quota system was instituted, as an example of Kaiser's benevolence toward white employees as well as blacks. They point to the new opportunities this created for those white Kaiser employees without prior craft experience. But of course they fail to mention that Kaiser could have implemented this salutary step without imposing racial quotas.

This Amicus submits that *all* "remedial priorities" voluntary imposed by an employer unilaterally or in concert with a union, whether or not discrimination had in fact previously occurred in the particular establishment, must be totally barred. No employer or labor organization should have the power to place itself above the laws forbidding discrimination. Unquestionable, no such entity could do so with the purpose of discriminating against minorities or women, and the law must not tolerate a double standard by which an employer or labor organization is permitted to inflict on non-minority employees the kinds of harm that they are barred from visiting on minority employees.

To conclude the discussion on this point, this Amicus wishes to highlight one additional fundamental flaw in any rule

permitting "do-it-yourself" quotas to be imposed jointly by a union and an employer who think that they may have been violating Title VII: such a rule would let the two contracting parties enter into a conspiracy to harm others in order to avoid liability for themselves. An employer and a union, realizing that one or both of them may be in trouble with the law, would not be required to assume the burden of atoning for whatever they have done wrong. Instead, they could visit employment discrimination on innocent third parties. Such discrimination would be much more vicious than that which is normally perpetrated on minorities, for the non-minority victims contemplated by the Union's "solution" would have *no remedy,* whether in government civil rights agencies or in the courts, for the grievous wrongs they would suffer: they would just have to "stand there and take it."

It would certainly seem that an employer and union which have a concern about possible liability under the civil rights laws would be—to put it mildly—directly confronted by a conflict of interests of tremendous magnitude, if it were possible for them to use as one option for escaping such liability the imposition of discriminatory measures against non-minority employees. But Petitioners' "solution" is to allow employers and unions that very option, in clear violation of Title VII and §1981. This Amicus respectfully submits that the Court should take the opportunity of the present case to foreclose any resort to such cynical and cruel measures. If crass self-interest and blatant disregard for innocent third parties' basic human rights are permitted to flourish under the rubric of "affirmative action," not only would the valuable concept embodied in that phrase be perverted beyond repair, but all our laws against employment discrimination would become a farce and a mockery.

Employers and unions must not be allowed to become "a law unto themselves" and decide when and against whom they can legally discriminate. To quote a famous self-appointed arbiter: " 'I'll be judge, I'll be jury,' said cunning Old Fury; 'I'll

try the whole cause, and condemn you to death.' " L. Carroll, *Alice's Adventures in Wonderland,* Ch. 3. That, we submit, is *not* the kind of decision-making contemplated by Congress when it enacted 42 USC §1981 and Title VII, nor by President Johnson when he promulgated Executive Order 11246.

E. Judicial Decisions Requiring Quotas to Remedy Proven Prior Discrimination Neither Compel Nor Justify an Employer's Self-imposed Voluntary Quotas or Preferences for Members of Selected Groups

Two Petitioners (Kaiser and the Government) erroneously point to various cases where courts have *required* preferences to be exercised by an employer who has been proven guilty of prior discrimination, alleging that they are authority for the proposition that voluntary preferences can be instituted. *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), addresses this issue. The court there explained that remedial quotas

> "have been allowed by the courts, but *only to correct* past discriminatory practices. In the instant case there has been no showing that the classifications and discriminations on the basis of race to be put into effect by the defendant school district, are to be undertaken to correct past discrimination. [Emphasis in original].
>
> No authority presently exists to uphold a practice which discriminates on racial or ethnic lines which is not being implemented to correct a prior discriminatory situation."
>
> 357 F.Supp. at 250.

Three years after *Anderson,* a decision by another Judge of the same Court struck down another preferential hiring plan, this one adopted by the Berkeley Fire Department. *Brunetti* v. *City of Berkeley,* ____ F.Supp. ____, 12 FEP Cases 937, 11 EPD ¶10,804 (N.D. Cal. 1975). The Court exhaustively reviewed the cases involving judicially-ordered remedial preferences. Its conclusion was that such relief must be severely limited:

> ". . . Each decision ordering or approving preferential treatment for minorities rested upon a specific judicial finding of past discrimination against minorities warranting temporary affirmative relief."
>
> 12 FEP Cases at 939.

The Court held in the case before it, since the record was "totally devoid of any legislative declaration of past, proven discriminatory practices by the City of Berkeley," that indeed

> "Defendants have consistently maintained that the Affirmative Action Program was not launched to rectify prior discrimination in the municipal work force . . . this court must find that no historical justification exists for Berkeley's affirmative action program, and that the program may not be sustained as a remedial measure. In absence of such a justification, the City of Berkeley may not afford preferential treatment to minority employees in violation of the rights of non-minority employees."
>
> 12 FEP Cases at 940-41.

(In this instance, the City of Berkeley had of course misused the phrase "affirmative action" to mean preferential treatment rather than legitimate non-preferential affirmative measures, just as Petitioners often do.)

The California Court of Appeal has now handed down a similar holding, affirming a lower court decision, in a case involving promotions to different positions in the same city's fire department as well as initial hiring for the agency. *Hiatt* v. *City of Berkeley,* 85 Cal. App. 3d 29, 149 Cal.Rptr. 155, 18 FEP Cases 233, 18 EPD ¶8712 (Cal. Ct. App. 1978).

It is thus clear that the body of authority with respect to court-ordered preferential relief in cases of actual proven discrimination is *not* authority for the imposition of such preferences by employers acting on their own initiative, and that indeed such cases frequently contain language expressly barring such self-administered preferences. Unlike "do-it-yourself" quotas, court-ordered preferences are controlled by an impartial tribunal which can oversee their administration or appoint a special master or referee to do so. (See, for example, the use of such a supervisory official in *E.E.O.C.* v. *Local* 638 . . . *Local 28 of the Sheet Metal Workers International Association,* 532 F.2d 821 [2d Cir. 1976]).

For that matter, the cases cited by the Government and Kaiser often show a great judicial sensitivity toward the gross inequities involved even in court-ordered remedial preferences. For example, in *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir., *en banc,* 1971), *cert. denied,* 406 U.S. 950 (1972), the Court, while imposing a remedial preference, nonetheless decried preferential treatment (452 F.2d at 330), struck a provision of the District Court's decree ordering an absolute minority remedial preference (at 331), termed its own less drastic relief a non-quota system because of its temporary nature (at 330), and stated that such relief would not "necessarily result in hiring less qualified minority persons in preference to more qualified white persons" (at 331). (The Court of Appeals ordered that one out of each three fireman hired be minority group members until twenty of the latter had been added to the Minneapolis Fire Department).

Nonetheless, it is argued that since courts may order remedial quotas in cases of proven discrimination, there is no bar to the employer, in the spirit of voluntary compliance with Title VII that the courts seek to foster, simply starting a scheme of preferences on his own. This reasoning is akin to a rationalization that could be advanced by the organizers of a lynching party: "Since courts can impose capital punishment, and since they are certain to do so in the case of this particular murderer, why should we wait for the law? Why can't we 'string him up' right now? After all, *we* know he's guilty!"

That line of thought was decisively refuted by the District Court for the Northern District of Georgia, which was forced to issue a preliminary injunction against the Atlanta Police Department's preferential treatment in favor of blacks. The Department, which was in the midst of a major lawsuit involving alleged employment discrimination against blacks, was warned that it could not institute preferentially remedial measures on its own. The Court explained that it:

> "wishes the parties to understand that if any such preferential or discriminatory action is necessary to overcome the effects of any prior discrimination, *it must* come by court decree—not by a subjective, individualized selection process where there is no opportunity objectively to ascertain the extent of the discrimination, or its necessity within the requirements of the Constitution of the United States. . . .
>
> In short, it is the opinion of this court that possibly unlawful discriminatory personnel changes are occuring so rapidly under the present Police Department's administration that to fail to issue this preliminary injunction might well totally frustrate this Court's power to deal with a difficult situation on a constitutional basis and reserve the field to the unguided, unsupervised, unreviewable, subjective selection process of the present police administration. The Court simply does not believe, under the law and Constitution, that can be tolerated."
>
> *Reeves* v. *Eaves,* 411 F.Supp. 531, 535-36 (N.D. Ga. 1976).

The subject of "do-it-yourself" preferences has recently evoked unfavorable comment from at least one member of this Court; in the concurring opinion of Mr. Justice Powell (at IV, Part B) in *Regents of the University of California* v. *Bakke,*

____U.S.____, 57 L.Ed.2d 750, 98 S. Ct. ___ (1978) (with the caveat noted above at page 8), the repudiation, as unlawful, of attempts to arrogate to non-judicial authorities the power to institute such preference schemes is clearly stated:

> "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. *That is a step we have never approved.* Cf. Pasadena City Board of Education v. Spangler, 427 US 424, 49 L Ed 2d 599, 96 S Ct. 2697 (1976)." 57 L Ed 2d 750, 783-84. (emphasis supplied).

The logic is unassailable: if an employer is indeed a violator of the law (*i.e.*, if he has discriminated without a court having so found), he can hardly be trusted to now go forward and discriminate in remedial fashion to undo his past discrimination (assuming that such a concept makes any sense at all). If, on the other hand, the employer has not discriminated on purpose, or has done so only in the "unintentional" fashion typified by the *Griggs* situation, he should certainly not be allowed to discriminate remedially, since even courts do not always require quotas in such cases. In the present case, there was no discrimination against minorities by Petitioner Kaiser, and thus even less excuse for a self-imposed quota.

Kaiser and the Government also rely on such Second Circuit decisions as *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408 (2d Cir. 1973), and *Patterson* v. *Newspaper Deliverers' Union,* 514 F.2d 767 (2d Cir. 1975). But the current views of the Court of Appeals for the Second Circuit are embodied in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, *rehearing denied,* 531 F.2d 5 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), which is discussed in Point IV-D, *supra.*

Kirkland explicitly states that *Wood, Wire & Metal Lathers* and *Patterson,* as well as other Second Circuit cases where quotas were imposed, met that Court's two prerequisites for justifying such relief. The fact situation in the present case would *not* satisfy the *Kirkland* criteria for a court-ordered remedial quota (quite aside from the fact that Kaiser and the Union had never violated minorities' Title VII rights), let alone a self-imposed quota. We respectfully invite the Court's attention to the exposition of this issue in Point IV-D, *supra.*

All the arguments on behalf of Petitioners that seek to draw analogies between court-ordered quotas to remedy prior discrimination and the one at issue here must grapple with the fact that Kaiser and the Union had not previously discriminated against minority employees. Thus, for example, it is argued that past "societal discrimination" justifies the quota in the instant case. Dissenting Opinion below, 563 F.2d at 234-6. But that assertion is not supported by case law: "no court has gone so far as to impose a quota on an employer who has not himself been guilty of past discrimination in order to remedy historic nationwide or regional practices." (Footnote omitted.) L. Lavinsky, "*Defunis* v. *Odegaard:* The 'Non-Decision' with a Message," 75 *Columbia L.Rev.* 520, 529 (1975).

Were the law otherwise, there would be no stopping point for the imposition of quotas by courts.

Although it is irrelevant, because no valid analogy from court-ordered quotas can be drawn with respect to the instant case, Kaiser's Brief (at 39) and the Government Brief (*e.g.*, at 52-4) emphasize that some courts have awarded preferential relief covering non-identified victims of discrimination. (Con-

trary to Kaiser's implication at 40, *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 [1976] does *not* uphold the substantive validity of that position. 424 U.S. at 773, n.32 and accompanying text.) It is true that some lower courts have awarded "class-wide" preferential relief in cases of actual discrimination, but such decisions are not in point here, where there were *no* minority victims, identified or otherwise, of prior discrimination by Kaiser.

Even in cases of proven deliberate discrimination, a court-imposed quota remedy can be denied if less drastic measures will suffice to correct the prior discrimination in question. *Harper* v. *Mayor and City Counsel of Baltimore,* 359 F. Supp. 1187, 1213-16 (D. Md. 1973), *modified on other grounds and affirmed sub nom. Harper* v. *Kloster,* 486 F.2d 1134, 1136 (4th Cir. 1973). This Amicus thinks that rule a wise one, and for that reason would not ask for a remedial quota in behalf of white victims of reverse discrimination. *Cf.* E.E.O.C. Decision No. 75-57, 8 FEP Cases 554, CCH E.E.O.C. Decisions ¶6420 (1973).

This Amicus would also bring to the attention of the Court two other recent cases wherein Courts of Appeals have refused to impose quotas for proven prior discrimination: *Sledge* v. *J.P. Stevens & Co.,* ____F.2d____, 18 FEP Cases 261, 275-79, 18 EPD ¶8657 (4th Cir. 1978); and *Mitchell* v. *Mid-Continent Spring Co. of Kentucky,* 583 F.2d 275 (6th Cir. 1978).

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), a school segregation case cited by Petitioners as authority for racial consideration in fashioning a remedy for prior discrimination and its effects, accords. Under the heading "Racial Balances or Racial Quotas," Mr. Chief Justice Burger stated, "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at 24. If the Court rejects quotas in a public school

situation where no pupil and no teacher will lose a place for racial reasons, there is all the more reason for it to reject Petitioners' flagrantly discriminatory quota scheme.

POINT V: ANYONE, INCLUDING MINORITIES AND WOMEN, CAN BECOME A VICTIM OF REVERSE DISCRIMINATION

It must be emphasized that a widespread myth about reverse discrimination is untrue: contrary to popular belief, the direct victims of this phenomenon are *not* limited to the class of white males. In some cases, members of one group who have historically been a target for discrimination are discriminated against in the name of helping members of another such group. For example, a New York Court has upheld the New York City Commission on Human Rights' finding in favor of a black complainant who had been discriminated against because the local school board wanted to award the position in question—a deputy superintendency—to an Hispanic applicant. In re *City Commission on Human Rights* (Community School Board No. 4), No. 40523/75 (Supreme Court, N.Y. County 1975); *N.Y. Post,* July 2, 1975, at 11.

Conversely, in the California state higher education system, several Mexican-Americans recently brought a federal class action against a state-run college for favoring blacks over them in employment and educational programs. *Crofts* v. *Board of Governors of California County Colleges,* Civil No. 75-337 (N.D. Cal., filed Feb. 18, 1975); *Los Angeles Herald Examiner,* Feb. 20, 1975, at A-7. (The suit was settled by a consent decree providing, *inter alia,* for "goals and timetables" benefiting Mexican-Americans in hiring.)

Among the cases where women have made charges of reverse racial discrimination are E.E.O. C. Dec. No 75-268, 10 FEP Cases 1502, CCH E.E.O.C. Dec. ¶6452 (1975) and *Silverman* v. *University of Colorado,* 541 P.2d 93,99, 11 FEP Cases 1462, 1466, *reversed,* 555 P.2d 1155 (Colo. 1976). On the other hand, a black man filed a charge with the Minnesota

State Department of Human Rights, claiming that the University of Minnesota officials had rejected him for a personnel position, which, they said, was reserved for female applicants only. B.R. Epstein & A. Forster, *Preferential Treatment & Quotas* 30 (Anti-Defamation League of B'nai B'rith Pamphlet, 1974).

And in *Hupart* v. *Board of Higher Education of the City of New York,* 420 F. Supp. 1087 (S.D.N.Y. 1976), Asian-Americans were subjected to reverse discrimination in the choice of entrants to a six-year combined college and medical school program. *Id.,* 1103. This, of course, is only to be expected, inasmuch as what Petitioners are propounding here is that all employers and unions be given *carte blanche* to discriminate in favor of whichever minorities they prefer and against whatever *non-minorities* and *minorities* they please. Thus, no one is really safe from being a victim of reverse discrimination.

As further evidence of this problem, we respectfully invite the Court's attention to a recent newspaper article, "Blacks and Women Clash on Access to Jobs and Aid," New York *Times,* Feb. 20, 1979, at A-10.

It should also be noted that, perhaps because of their awareness of these matters, 64% of non-white Americans reject the idea of preferential treatment, 27% favor it, and 9% have no opinion. (The national figures for all Americans are 83% opposed, 10% in favor, and 7% with no opinion.) Press release, The Gallup favoring May 1, 1977, at 3, summarized in New York *Times,* May 1, 1977, at 33.

(While a more recent Louis Harris poll showed a majority of *whites* favoring "affirmative action," the responses in that survey specified that such measures should be carried out without "rigid quotas." New York *Times,* Feb. 21, 1979, at A-14.)

POINT VI: REVERSE DISCRIMINATION IS MORALLY WRONG

One of the philosophical bases of the position of this Amicus is found in the writings of Aristotle, who distinguished two different varieties of justice. Commutative (also called corrective or rectificatory) justice prescribes that one who has harmed another by means of a civil wrong, such as a tort or breach of contract, "should compensate the victim in an amount equal to the harm thus caused." The other type, distributive justice, "is designed to distribute the honors or rewards of a society among its members in proportion to their merits." E.W. Patterson, *Jurisprudence* 391 (1953); E. Barker, *The Politics of Aristotle* 363 (Oxford Galaxy, paperback 1962). Clearly, those who espouse preferential treatment are confusing these two kinds of justice. They are applying the principle of rectificatory justice to a situation where distributive justice, which in the Aristotelian scheme corresponds to the merit system, should govern. Despite the fact that our society has indeed done grievous harm to members of minority groups and women by denying them their rightful opportunities for self-fulfillment, the remedy does not lie in doing the same thing—ironically in the name of justice—to innocent members of other groups.

Another underpinning for this belief is found in a concept developed by the late American legal philosopher Edmond Cahn, a professor at New York University School of Law.

Cahn believed that we can ascertain what is just and right only from the "consumer perspective." He contrasted this viewpoint with the "imperial" or "official" perspective. Cahn was not referring to what we now call "consumer protection" or "consumerism." He meant the viewpoint of the *individuals* affected by the problem involved and by efforts to solve it. Cahn saw that it is always one or more individuals who *consume* the results of the decisions made by officialdom, and that justice or injustice of governmental decisions (or other

authoritative actions) must be assessed from the standpoint of those individuals, not from that of the decision makers.

This way of looking at things, said Cahn, can be compared to the "official or imperial perspective"—that of administrators, bureaucrats, legislators or other decision makers in the public or private sectors. These people, often with the best of motives, tend to ignore, downgrade or violate individuals' interests in order—so they say—to best serve those of "society," or of some governmental or other entity such as a school, association, corporation, municipality or group of persons. That this may often entail cruelty and inflict suffering on specific individuals, with or without visible benefits to the entity involved, is deemed irrelevant by those who take this perspective. At the most, they say , such unfortunate factors must be subordinated to various paramount considerations, which include "the necessity for showing respect for expert judgment and administrative convenience" and "the necessity of leaving certain wrongs, however grievous they may be, to the province of morals." These and other examples of phrases and maxims used to justify injustices to individuals (although they have their proper uses as well) were set forth by Professor Cahn. See E. Cahn, *The Predicament of Democratic Man,* 17-42 (1961); E. Cahn, "Law in the Consumer Perspective," 1'2 *U.Pa. L. Rev.* 1 (1963).

The application of this reasoning to reverse discrimination is obvious. Whether or not it is "true" discrimination is a question that must be determined from the standpoint of the victim, not from that of society in general. Viewed from this proper perspective—that of the true consumer of the act—it is discrimination as injurious and cruel, if not more so, as the original acts of bigotry which we vainly hoped would be halted by the passage of civil rights laws. The victim of any act of discrimination, be he a member of the majority or of a minority, is truly a consumer of injustice. If he asks a government agency to counteract some decision maker's policy of reverse discrimination, and is rebuffed—perhaps because the policy was implemented at the behest of that same agency—his

lot is even more bitter. This particular fate does not befall victims of "traditional" discrimination.

There is little need to quote the vast literature attacking reverse discrimination written by those who align themselves with various philosophies known as "conservatism." The antipathy of conservatives to this particular evil is well known. But it might be worth quoting a liberal spokesman, a young philosopher who wrote an article published in *The Humanist* magazine, about how he became a victim of reverse discrimination when a state university denied him a job so that it could hire a woman (and admitted this fact in writing):

> "Many of my friends, comrades in political philosophy and causes, expressed surprise and dismay over my new found 'conservatism.' The entire affair provoked the following reflections.
>
> Too much of so-called liberal or progressive thinking today is in fact illiberal, unprogressive, and unintelligent. The essence of liberalism has always been concern with the welfare, rights and responsibilities of *individuals qua individuals,* not the masses or classes or other such linguistic abstractions. Furthermore, although there has been disagreement among liberals as to what social arrangements might best liberate individual capacities, no disagreement exists with the thesis that illiberal means, means that impose *avoidable* injustices on individuals, cannot achieve just ends.
>
> Therefore, when my letter-writing liberal or radical critics and friends explain that "in social situtations no one is truly innocent" or that "power is the name of the game" or that in effect, if one is a white male he is "guilty" of job discrimination because other white males have so discriminated and therefore "reparations" are justified and required—something seems peculiar. We find here no concern for the

individual. What the person *did* as a person is irrelevant. His gender and race in some mysterious way render him guilty of offenses and deserving of admittedly unfair treatment. It hardly needs to be said that such proposals are neither liberal nor intelligent much less morally intelligible.

Commonsensically, racial, ethnic, or sexual classes do not seek employment; individuals do. Commonsensically, discrimination is making racial, ethnic, or sexual classifications relevant criteria for jobs in which such criteria are clearly irrelevant to performing the task. As we know, the consequences of making such classifications conditions for employment have been amply and notoriously experienced by individuals who are black, female, Mexican-American, or other. To claim now that these criteria *are* relevant to employment when used to even the score for the "good guys" is literally doublethink. The proposal that such doublethink can serve as a principle of social and economic justice is a classic example of the foolish attempt to secure just ends (equal job opportunity) through unjust means (reverse discrimination). Yet, now we face the specter of a government-administered program trying to accomplish this impossible feat and thereby perpetuating the very abuses that genuinely progressive people have labored so long to eliminate.

I conclude therefore, that labeling support of Affirmative Action programs of the sort discussed 'liberal' or 'progressive,' is not only mistaken, but slanderous."

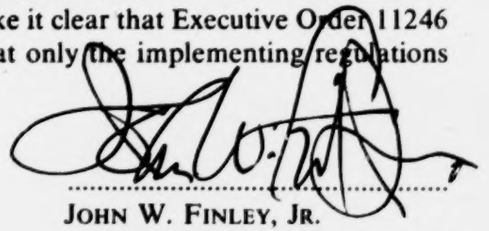
L. Nisbet, "Affirmative Action—A Liberal Program?", in B. R. Gross (ed.), *Reverse Discrimination* 50, 52-3 (1977).

CONCLUSION

Blatant racial discrimination has excluded Respondent Weber from his rightful opportunity to enter a craft job training program at Kaiser's plant.

The Courts below recognized this and acted accordingly, declaring the practices of Petitioners illegal.

However, while the decision below should be affirmed, it should be corrected to make it clear that Executive Order 11246 is unobjectionable and that only the implementing regulations thereunder are illegal.



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Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1978

No. 78-435

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Petitioner,

v.

BRIAN F. WEBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CITY OF LOS ANGELES AS AMICUS CURIAE

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This brief of the City of Los Angeles, as Amicus Curiae, is filed by the City Attorney pursuant to Rule 42(4) of the

Rules of the Supreme Court.

INTERESTS OF THE AMICUS CURIAE

The City of Los Angeles is a municipal corporation within the State of California. The interests of the City arise from its position as a public sector employer which has a Charter responsibility to staff its city departments in a way which will effectuate the accomplishment of municipal goals, consistent with civil service merit principles.

Further, the City of Los Angeles has an interest in defending its personnel actions in litigation. In recent years, the City of Los Angeles has been sued in Title VII actions brought by the Federal Government on two occasions, one involving alleged race and sex discrimination in its Police Department, and the other involving alleged race discrimination in its Fire Department. The latter case was settled by consent decree in 1974.

Pursuant to that consent decree, the City began a program of race-conscious hiring for the Los Angeles City Fire Department. That program was challenged by certain applicants for the Firefighter

classification in a lawsuit filed in 1977. That litigation is currently pending in U.S. District Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, the Amicus argues that Title VII of the 1964 Civil Rights Act implemented substantive standards which parallel those under the Fourteenth Amendment of the United States Constitution. Therefore, an employer may demonstrate the lawfulness of a race-conscious method of selection by demonstrating a compelling need for integration in a workforce combined with a showing of the necessity for the selection method being utilized.

As a case study of a situation in which a race-conscious selection method may be justified by both a compelling need and necessity, the Amicus relates its experience in hiring Firefighters for the City of Los Angeles. For over a decade the Amicus attempted various ways to appoint minority Firefighters without noticeable success. If was only after the implementation of a race-conscious selection method, adopted after a consent

decree with the United States Department of Justice, that the Amicus achieved dramatic gains in the representation of minorities.

Further, in the event that this Court reverses the decision of the United States Court of Appeals for the Fifth Circuit in this case, the Amicus asks that this Court correct the misinterpretations of Title VII made by the dissenting Judge in that decision. Specifically, the Amicus asks that this Court reiterate the usefulness of evidence of an employer's good faith in defending Title VII litigation, and reject the dissenting Judge's view that the only probative evidence in a Title VII case involving personnel tests is a formal validation study.

ARGUMENT

I.

EMPLOYERS MAY LAWFULLY UTILIZE RACE-CONSCIOUS TECHNIQUES OF SELECTING EMPLOYEES WHERE THERE IS A COMPELLING STATE INTEREST, AND WHERE SUCH TECHNIQUES ARE NECESSARY

The single biggest risk to the interests of this Amicus is that, in deciding the instant case, this Court may close the door to the utilization of race-conscious techniques of hiring under any circumstances covered by Title VII of the 1964 Civil Rights Act. In the paragraphs below, Amicus argues that, at least under certain circumstances, such techniques are necessary and lawful.

A. Race-Conscious Hiring in the Los Angeles City Fire Department: A Case Study Demonstrating the Necessity for Such a Program.

In the decade between 1964 and 1974, the City of Los Angeles experienced a dilemma not uncommon to many municipalities in the United States. First, various minority communities within this City were increasing dramatically, most

notably, the Black and Hispanic populations.[1] However, during that decade there was no increase in the representation of minorities in the sworn ranks of the Fire Department. Caucasians continued to comprise 95.9%[2] of those sworn positions. Indeed, of the 997 Firefighters appointed between 1964 and 1974, only 25 were Black, of which 13 had been appointed during 1973 and 1974.

1/ For example, in the three decades between 1940 and 1970 census, the percentage of Blacks in the total population of the City of Los Angeles grew from 4.2 percent to 17.9 percent. Similarly, in the two decades between the 1950 census and the 1970 census, the percentage of Spanish-surnamed individuals in the City grew from 7 percent to 18.4 percent.

2/ The facts set forth in this portion of the brief have been submitted to the U.S. District Court for the Central District of California in U.S. v. City of Los Angeles (Hoff, et al., Intervenors and Cross-Claimants), No. CV 72-1806-LTL in the following documents: "Affidavit of Jeff Pfau in Opposition to the Intervenors' Motion for Summary Judgment . . ." (filed September 1, 1978) and "Affidavit of [Chief] John C. Gerard in Opposition to the Intervenors' Motion for Summary Judgment . . . " (filed September 1, 1978).

Similarly, only 27 Hispanics had been appointed during that time period, 17 of whom had been appointed during the last two years. The Asian population, which also comprises an increasing percentage of the City's population, was represented by a single appointment during that decade.

The risk to the City from such a dismal record of appointments cannot be fully quantified. Firefighting tasks were becoming increasingly difficult in the minority communities. For example, minority students demonstrated little interest in Fire Department educational programs. Firefighters investigating the ownership of homes had difficulty obtaining information from residents of those communities.

The nature of Fire Department tasks require that Firefighters enjoy good relationships with the residents of its service community. Unless the community perceives that the Department is a fair institution, committed to equal employment opportunity, Firefighters will be unable to obtain the cooperation necessary to properly perform their functions.

After its 1974 consent decree with the Department of Justice, in which there was no finding or admission of discrimination, the City began a race-conscious hiring program accompanied by vigorous recruitment and the use of merit system tests to the extent possible, consistent with its race-conscious program. The result was startling. In approximately three and one-half years, from 1975 through the first half of 1978, the Fire Department appointed 190 Black Firefighters and 272 Hispanics of a total of 907. In addition, 45 Asians were appointed during that period. As a result of that program, the City's Fire Department is reversing its image as virtually an all-white organization.

However, the use of race-conscious hiring by the City to increase the effectiveness of its Fire Department was not without its legal risks. (As dissenting Judge Wisdom spoke metaphorically in the instant case, an employer is walking "a high tight rope without a net . . . ." Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 230 (5th Cir. 1977).) During 1977, the City was sued by 14 applicants for the

Firefighter classification, charging "reverse discrimination" in its race-conscious program. The City has lost two motions for summary judgment, and now faces a trial in that matter in mid-1979. United States v. City of Los Angeles, et. al., No. CV 72-1806-LTL (C.D. Cal.).

This Amicus submits that both the City's race-conscious hiring program and that of the employer herein should be considered lawful based upon this Court's resolution of Regents of the University of California v. Bakke, ____ U.S. ____, 98 S.Ct. 2733 (1978). The Bakke analysis, which also is applicable to the employer in the instant case, has two major premises: first, Title VII was intended to implement a constitutional standard; and, second, the Constitution does not forbid a race-conscious program of selection which meets the requisite legal tests.

B. The Legal Standards of Title VII in the 1964 Civil Rights Act, as Amended, are the Same as the Constitutional Standards: Race is a Permitted Classification Under Both Provisions.

One of the critical differences between the minority block of this Court

in Bakke (consisting of the Chief Justice, Justice Stewart, Justice Rehnquist, and Justice Stevens) and the majority (which included Justice Powell) is the legal issue regarding the standards under the Constitution and Title VI of the 1964 Civil Rights Act. Obviously, the threshold question to any court considering this matter is whether Title VII of the 1964 Civil Rights Act contemplated a standard which was different than that provided by the Fourteenth Amendment.

Although there is no Supreme Court case directly on point, the analysis of the Bakke decision and the legislative history of the 1964 Civil Rights Act, as amended, lead to one undisputable conclusion: that Title VII of the 1964 Civil Rights Act was intended to provide remedies for discrimination, and to apply the standards which previously had been articulated under the Fourteenth Amendment.

1. The Bakke Case Supports the View That Allegations of Discrimination are Measured by the Same Substantive Standards Under Title VII and the Fourteenth Amendment.

A basic conflict between the majority (including Justice Powell) and the

minority blocks of the Supreme Court in the Bakke case was whether the substantive standards of evaluating "discrimination" were more stringent under Title VI than they were under the Constitution. The minority justices emphasized that Title VI of the 1964 Civil Rights Act required absolute "color blindness" on the part of a recipient government.

Such a view of either Title VI or Title VII, of course, would require that all affirmative action plans, which are color-conscious by their very nature, be held unlawful. That view was rejected by a majority of the Court in both the Powell opinion and the opinion of Justices Brennan, White, Marshall and Blackmun. Those Justices found that Title VI "merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds " (Regents of Univ. of Calif. v. Bakke, 98 S.Ct. at 2768 (Op. of Justice Brennan, et al.)), and that the Constitution provided that race-conscious techniques of selection were lawful under certain limited circumstances.

Because of the parallel language found in Title VI and Title VII, the same substantive standard -- that of the Fourteenth Amendment -- was contemplated by both provisions. Compare 42 U.S.C. §2000d with 42 U.S.C. § 2000e-2(a).

2. An Examination of the Legislative History of Title VII Demonstrates That, in the 1964 Civil Rights Act, Congress Intended to Merely Provide Additional Remedies for Alleged Discrimination, and Did Not Modify Substantive Standards of the Fourteenth Amendment.

Examination of the legislative history of Title VII reveals that the Civil Rights Act of 1964 embodies constitutional standards. In originally promulgating Title VII in 1964, Congress relied on two clauses: (1) § 5 of the Fourteenth Amendment (see 110 Cong. Rec. 6553 (1964)); and (2) the Commerce Clause (110 Cong. Rec. 14448 (1964)). Portions of the 1964 legislative debates indicate that constitutional principles were to be embodied in Title VII of the Civil Rights Act:

> [T]his title would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity.
>
> * * *
>
> All this is subject to one qualification, and that qualification is to state: "In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin, or sex."
>
> This is all this provision does. It would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws. [110 Cong. Rec. 13079-80 (1964). (Emphasis added.)]

Moreover, responding to the question whether it is a constitutional right to have a job, one of the proponents of the bill, Senator Javits, stated that the Constitution protects a person from being denied a job solely on account of his race. The Senator stated,

> [H]e should not be denied a job because his skin is black. The basis of the 14th amendment is that every person similarly situated shall have the equal protection of the law. [110 Cong. Rec. 9603 (1964).]

Thus, Title VII shall be viewed as having enacted statutes which parallel the constitutional restraints against racial discrimination.

That interpretation is also supported by the legislative history preceding the 1972 amendments to Title VII. In 1969, the United States Commission on Civil Rights published its findings that state and local governments were engaging in policies and practices which denied minority group members equal employment opportunities. The Commission expressed particular concern about the absence of significant numbers of Blacks holding positions in fire departments throughout the country. 118 Cong. Rec. 1817 (1972). Consequently, the Commission made recommendations as to how state and local governments should comply with the obligations of the Equal Protection Clause. Those recommendations, later recorded in the Congressional Record, included the following:

> Every State and local government should adopt and maintain a program of employment equality adequate to fulfill its obligation under the equal protection clause of the 14th amendment to assure --
>
> 1. that current employment practices are nondiscriminatory; and
>
> 2. that the continuing effects of past discriminatory practices are undone. [118 Cong. Rec. 1817 (1972).]

On the basis of those findings and recommendations, Congress moved to amend Title VII in 1972 to include state and local governments within the definition of "employer", to provide public employees with the same remedies previously available only to private employees. See 1972 U.S. Code Cong. & Ad. News 2153-54. However, throughout the 1972 legislative debates, proponents of the amendments emphasized that the amendments enacted constitutional principles. Senator Williams remarked,

> The 14th amendment guarantees equal treatment of all citizens by states and their political subdivisions, and the Supreme Court has reinforced this directive by holding that state action which denies equal

protection of the laws to any person is in violation of the 14th amendment. It is thus clear that the guarantee of equal protection must extend to discriminatory practices of state and local governments, where such discrimination is based upon race, color, religion, sex or national origin. [118 Cong. Rec. 1816 (1972).]

In an interchange between Senators Ervin and Williams, it was made clear that constitutional principles were to govern the application of Title VII to the states.

> Mr. Williams: If the Senator is talking about racial discrimination or preference, the 14th amendment goes back more than one hundred years. There, the constitutional equality is protected. What we are doing is exactly what is suggested in the 14th amendment, section 5:
>
> > The Congress shall have power to enforce by appropriate legislation, the provisions of this article.
>
> And here we are, legislating.
>
> Mr. Ervin: One of the provisions of that amendment is that nobody shall be deprived of liberty without due process of law; and at one time the 14th amendment was construed to mean that a man had liberty of contract, which this bill would take away.

> Mr. Williams: Nor deny to any person within its jurisdiction the equal protection of the laws. People are protected in this country against discrimination because they are black. The Constitution has said it, and what we are doing now is making sure that the Constitution means what it says. It is as simple as that. [118 Cong. Rec. 309 (1972).]

What emerges from the debates and reports is Congressional intent to ensure that private and public employers comply with the constitutional mandate to not discriminate on the basis of race. In amending Title VII in 1972, Congress acted to include state and local governments and to require them to act in conformance with the Equal Protection Clause of the Fourteenth Amendment. Therefore, the Fourteenth Amendment, Title VII, and Title VI must be interpreted consistently to require the same substantive standards.

3. In Any Event, Congress Did Not Have the Power, Under Section 5 of the Fourteenth Amendment, to Extend Any More Stringent Standards on a State or Local Government Than That Which Was Provided by That Amendment.

Even if the legislative history and the Bakke analogy did not sufficiently

demonstrate that Title VII was implemented to provide the same substantive standards as the Fourteenth Amendment, such an interpretation is compelled by the Tenth Amendment of the United States Constitution and the concepts of federalism. As the Honorable Jesse W. Curtis, United States District Judge, stated in an analogous situation:

> [I]f applying Title VII standards to local and state agencies brings into play a standard more stringent than appropriate under the Fourteenth Amendment, there would appear to be a constitutional conflict with the Tenth Amendment. [Blake v. City of Los Angeles, 435 F.Supp. 55, 63 (C.D. Cal. (1977)) (9th Cir. appeal pending).]

Although the United States Supreme Court has not yet reached the issue of the constitutionality of the 1972 amendments pertaining to local governments (see Dothard v. Rawlinson, 433 U.S.321,323 n.1 (1977); Hazelwood School District v. United States, 433 U.S. 299, 306 n.12 (1977)), both the Tenth

Amendment and the concepts of federalism embodied in the Constitution stand as a bar to any extension of a substantive standard beyond that provided by the Fourteenth Amendment.

Because the substantive standards of the Fourteenth Amendment are the only standards which may constitutionally apply to municipalities, the analysis of a race-conscious classification must be the same under Title VII as that which was utilized by the majority of the Supreme Court in the Bakke decision. That analysis must also apply to private sector employers if Title VII is to "be applied to governmental and private employers alike." Dothard v. Rawlinson, supra, 433 U.S. at 331 n.14.

C. The Lawfulness of Kaiser's Affirmative Action Program for Craft Positions Should be Determined by Reference to the Bakke Analysis.

Generally speaking,

> Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. [Regents of Univ. of Calif. v. Bakke, supra, 98 S.Ct. at 2749.]

Therefore, the Supreme Court has held

> that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."
> [Id. at 2756-57. (Powell Opinion, citing cases.)]

As the first prong of the two-part Powell analysis of a race-conscious classification, this Court should examine whether there is a compelling state interest in the integration of the craft positions at issue in this litigation.

Secondly, Kaiser must demonstrate that the program challenged in this litigation was necessary to the furtherance of that compelling interest. From the Amicus' experience with the Firefighter classification (see pp.5-8, supra), it knows of the utter futility of attempting to integrate a portion of an employer's workforce which has few minorities by other than race-conscious means. In fact, throughout the decade of the 1960's, the City attempted one program after another

to effectively attract and appoint minorities to the Fire Department without noticeable success. For example, in 1960, at the behest of representatives of the minority community, this Amicus mandated that interview boards must consist solely of raters from outside City service.[3/] Next, in 1961, the Amicus abandoned the interview as a ranking device, and utilized a written examination to rank fire candidates to avoid charges that the interview was biased against minorities. However, because of the lack of results in that method of testing, the City of Los Angeles reinstated the oral interview in 1965.

In 1967, this Amicus began active recruitment of minority persons for the Firefighter classification, but it was not until the implementation of the race-conscious hiring program in 1974 that the numbers of minorities inducted rose dramatically to the present levels. In

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[3/] The facts in this paragraph are found in U.S. v. City of Los Angeles, supra, at "Affidavit of Muriel Morse in Support of Defendant's Motion for Summary Judgment (filed January 25, 1974).

the five years following the implementation of that program, the percentage of Caucasians among sworn firefighting personnel has declined from 95.9 percent in 1974 to 85.5 percent in 1978. Concomitantly, the percentage of Blacks has more than doubled from 1.5 percent to 3.8 percent, and the percentage of Spanish surnamed individuals (or "Hispanics") has tripled from 2.6 percent to 8.5 percent. Based on its experience, this Amicus submits that a race-conscious program of hiring or training may often be the only way for an employer to substantially integrate a workforce.

II.

IF THE COURT REVERSES THE FIFTH CIRCUIT'S WEBER DECISION, CERTAIN LEGAL MISPERCEPTIONS OF THE DISSENTING JUDGE SHOULD BE CORRECTED

Although the dissenting opinion of the Honorable John Minor Wisdom, Senior Circuit Judge, demonstrated remarkable sensitivity to the problems of an employer, he also made two major errors in his legal analysis which could have far-reaching ramifications if they are not

corrected by this Court at the time of a reversal of the Weber case. The first of those errors is his assertion that "[g]ood faith . . . is not a defense to Title VII." Weber v. Kaiser Aluminum & Chemical Corp., supra, 563 F.2d at 232. Secondly, Judge Wisdom consistently refers to "Title VII's requirement that employment tests must be validated . . . ." Id. at 236. Those points are discussed below.

A. The Focus of a Title VII Suit is Whether Discrimination Exists, and Evidence of Good Faith is Probative in the Defense of a Title VII Suit.

Judge Wisdom's belief that "good faith . . . is not a defense to Title VII" most likely results from his interpretation of this Court's language in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). There, this Court stated that when employment procedures or testing mechanisms operate as "headwinds" to minority groups, and when those procedures or tests are "unrelated to measuring job capability", an employer's nondiscriminatory subjective intent does not "redeem" the use of those practices or tests. Id. The Duke Power

Company had used an apparently specious classification system (an all Black "Labor" department in which workers were paid less than the incumbents of the white "Coal Handling" department), and had implemented the use of standardized intelligence tests unrelated to either classification on the very day that Title VII became effective. Id. at 427. On the basis of those facts, this Court held that evidence of managers' intent would not vitiate the obviously discriminatory practice.

However, this Court has never held that the employer is to be strictly liable for the effects of an employment procedure, regardless of his or her state of mind. Indeed,

> The central focus of the inquiry in a [Title VII case] is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." [Furnco Construction Co. v. Waters, ____ U.S. ____, 98 S.Ct. 2943, 2949 (1978).]

Because the central focus of a Title VII case is the existence of unlawful discrimination, evidence of an employer's good faith is surely relevant, and, in an appropriate case, that evidence may be

determinative.

B. In Reversing the Weber Case, This Court Should Correct Judge Wisdom's Impression that Title VII Requires That Personnel Tests Be Subjected to the Experimental Process of "Validation".

In his dissent, Judge Wisdom on several occasions refers erroneously to the "Title VII [] requirement that employment tests must be validated . . . ." See Weber v. Kaiser Aluminum Company, supra, 563 F.2d at 236. Indeed, at one point he goes so far as to invent a new legal standard for the review of employment tests, stating that those tests must be "job-validated". Id. Such a standard misperceives the state of the law and the state of the science of industrial psychology, and is potentially damaging to employers seeking to achieve merit selection apart from the necessary and compelling use of race-conscious methods in certain situations.

As the Cities of Los Angeles and San Diego explained in their amicus brief filed in Detroit Edison Company v. National Labor Relations Board, Sup. Ct. No. 77-968, a personnel test is useful to an employer, if, generally speaking, individuals performing

relatively better on the test generally perform relatively better on the job. In a broad sense, the extent to which a test is capable of predicting the success of employees on a job is its "validity". E. McCormick and J. Tiffin, Industrial Psychology 101 (6th Ed. 1974).

However, lawyers and judges often confuse the concept of "validity" with a formal "validation study". For example, a statistical validation study is a written report of an experimental evaluation of the validity of a test, conducted by an industrial psychologist pursuant to certain scientific principles. Although experimentalists in the field of test validation uniformly stress the desirability for such formal evaluation[4/] a "valid" test may or may not have been "validated". Further, a test which was once "validated" may or may not continue to be "valid" for a particular job if there have been shifts in such variables as the nature of applicant population.

[4/] See, e.g., E. McCormick & J. Tiffin, Industrial Psychology, supra, at 102.

See R. Guion, Personnel Testing 21 (1965).

Although the statute does not mention the need for "validation", it has become popular for plaintiffs and compliance agencies to demand such experimental studies as evidence of job-relatedness because of the difficulty of such analysis. As Mr. David Rose, the Justice Department staff representative to the Equal Employment Opportunity Coordinating Council wrote in 1976,

> [T]he thrust of the present [EEOC] guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring. [Rose, "Memorandum for the Deputy Attorney General Re: Selection Guidelines" (April 12, 1976), published in the Bureau of National Affairs' Daily Labor Report, No. 121, pp. AA-2 et seq. (June 22, 1976).]

The specific fallacies in the various compliance agency guidelines discussing "validation" are well documented and will not be repeated here. See, e.g.,

"Brief of City of Los Angeles and City of San Diego as Amici Curiae in Support of Petitioner", Detroit Edison Co. v. National Labor Relations Board, Sup. Ct. No. 77-968, at pp. 18-25.

While Judge Wisdom's innovation of the requirement of "job validation" is consistent with the views of certain compliance agencies, it is inconsistent with prior interpretations of Title VII made by this Court. For example, in Griggs v. Duke Power Co., supra, 401 U.S. at 432, the employer's personnel tests were rejected because they were "unrelated to measuring job capability", rather than any failure to subject those tests to a process of "validation".

Further, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), while rejecting a last minute half-day validation study as appropriate evidence to support the job-relatedness of standardized intelligence tests for relatively unskilled jobs, this Court established that a formal validation study was not the sine qua non of a demonstration of job relatedness. For example, this Court specifically stated that

"[t]he concept of job relatedness takes on meaning from the facts of the Griggs case." Id. at 426. Looking at those facts, this Court reviewed the intent of the employer,[5/] and the preparation that the employer made for instituting the testing program.[6/]

5/ "Neither [intelligence test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 426, quoting Griggs v. Duke Power Co., supra, 401 U.S. at 428.

6/ "Both [intelligence tests] were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job performance ability." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 426, quoting Griggs v. Duke Power Co., supra, 401 U.S. at 431.

Secondly, in the Albemarle case, this Court recognized that "[t]he question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." Id. at 427. Therefore, the facts surrounding the implementation of a testing program, such as the existence of a civil service merit system, should be influential in determining whether a test is "job related". However, under Judge Wisdom's standard, a District Court would look only to the formal experimental "validation" study; and would not consider the needs, motives, and implementation procedures of an employer utilizing a personnel test.

This Amicus urges the Court, if it reverses the Fifth Circuit's Weber decision, to reject Judge Wisdom's view that whether an employer is to be guilty of employment discrimination in a personnel testing case is measured solely by the quality of a formal process of "validation". Further, it asks this Court to reiterate its standards pronounced in Griggs in a manner which will make it unmistakably clear that the central focus in any Title

VII litigation is whether actual discrimination exists, rather than whether a formal experimental study is technically perfect.

CONCLUSION

For the reasons expressed in the foregoing pages, the Amicus asks that this Court recognize the legitimate use of race-conscious selection techniques in certain employment situations. The Amicus suggests that the Court reach that decision through an application of its Bakke decision, and that it specifically hold that Title VII was intended to implement constitutional standards of nondiscrimination in employment.

The Amicus also suggests that this Court should reject certain views of the dissenting Judge in the Fifth Circuit's decision. To overcome any erroneous inferences that might arise from his opinion, this Court should reiterate that the issue of discrimination is one in which the Court deciding the matter may draw upon any and all possible

evidence going to the issue which is the central focus of Title VII cases: whether there has been any unjustifiable discrimination against an individual by an employer.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

Supreme Court, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435 and 78-43

UNITED STEELWORKERS OF AMERICA, [illegible]-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; HELLENIC BAR ASSOCIATION OF ILLINOIS; INSTITUTE FOR LIBERTY AND JUSTICE — ORDER OF SONS OF ITALY IN AMERICA, INC.; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"); UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL

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IN THE

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October Term, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA,
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BRIAN F. WEBER, *et al.*,
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No. 78-436

UNITED STATES, *et al.*,
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BRIAN F. WEBER, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; HELLENIC BAR ASSOCIATION OF ILLINOIS; INSTITUTE FOR LIBERTY AND JUSTICE — ORDER OF SONS OF ITALY IN AMERICA, INC.; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"); UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL

Amici respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit in the above-captioned cases should be affirmed.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 563 F.2d 216 (1977); rehearing was denied by that Court as reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1977).

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. §1254.

Consent of Parties

Petitioners and Respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

Interest of *Amici Curiae*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under law regardless of his race or religion.

Among its other activities directed to these ends, the Anti-Defamation League has filed briefs *amicus curiae* urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of University of California* v. *Bakke*, 98 S. Ct. 2733 (1978); and *County of Los Angeles* v. *Van Davis*, O.T. 1978, No. 77-1533, now pending decision in this Court after briefing and argument.

The Hellenic Bar Association of Illinois is an organization of attorneys in that state of Greek extraction or

descent. Its essential purpose is to foster better relations between attorneys and the communities which they serve.

The Institute for Liberty and Justice—Order of Sons of Italy in America, Inc. is a fraternal organization of approximately 95,000 members belonging to 22 Grand Lodges in 24 states. All persons of Italian birth or descent, or persons adopted by those of Italian lineage, and their spouses are eligible for membership in the organization. One of the principal purposes of the organization is to participate in the political, social and civic life of the community and in particular to strive toward fair and equal treatment of all individuals regardless of race or national origin.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of attorneys and social scientists organized to combat discrimination and is committed to securing the right of observant Jews, along with other Americans, to equality of opportunity. COLPA is the principal non-governmental agency involved in the protection of the legal rights of observant Jews. COLPA has appeared in that capacity before numerous courts, including this honorable Court. COLPA represents the following organizations on public legal issues: Agudath Israel of America, The Rabbinical Council of America and the Union of Orthodox Jewish Congregations of America.

The Ukrainian Congress Committee of America, Chicago Division, is an umbrella organization of all Ukrainian-American civic, church, educational, cultural, sports and youth organizations in the Chicago metropolitan area. The organization represents the interests of the Ukrainian community at the city, state and federal government levels and is also engaged in charitable activities by assisting needy immigrants.

UNICO National is the nation's largest Italian-American community service and public affairs organization, with 140 chapters throughout the United States. UNICO National represents approximately 50,000 people and has as its objectives to foster, encourage and promote the Italian heritage and culture as a creative force for the good of all Americans and to enhance the interest of each member in the public welfare of his community. UNICO National is 55 years old and has been active in the areas of scholarship, aid to the physically handicapped, and the fostering of research in the afflictions of mental health.

The *Amici Curiae* are particularly concerned about the use of racial quotas, the "numerus clausus," because of the historically documented evils that are necessary corollaries of their use. It is just such a "numerus clausus" that is at issue in this case.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides, *inter alia*:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the Constitution of the United States provides, *inter alia*:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d), provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), in relevant part, reads:

> The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Questions Presented

1. Can a collective bargaining agreement impose racial quotas prohibited by Title VII?

2. Can racial quotas be imposed pursuant to an Executive Order but in conflict with a Congressional statute?

Statement

The facts of this case are not disputable. They are established by the findings of the United States District Court for the Eastern District of Louisiana, 415 F. Supp. 761, which were affirmed by the United States Court of Appeals for the Fifth Circuit, 563 F.2d 216. Although the Court of Appeals was divided two-to-one on the propriety of the judgment based on these facts, there was no disagreement between the majority and the minority about the facts. "The majority accurately and completely presents the facts of this case." *Weber* v. *Kaiser Aluminum and Chemical Corp.*, 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting). This Court's "two-court" rule properly forecloses it from engaging in fact-finding *ab initio*, as Petitioners would have it do. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342-43 (1977); *Corn Products Refining Co.* v. *Commissioner*, 350 U.S. 46, 51 (1956); *Faulkner* v. *Gibbs*, 338 U.S. 267 (1949); *Comstock* v. *Group of Investors*, 335 U.S. 211, 214 (1948); *United States* v. *Dickinson*, 331 U.S. 745, 751 (1947); *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630, 636 (1946). In any event, there are no facts of record to warrant any such inconsistent findings as the Petitioners would have this Court make.

The relevant facts are clear. Respondent Weber is a white employee at Petitioner Kaiser Aluminum & Chemical Corp.'s ("Kaiser") Gramercy Works in Louisiana. He was an applicant for an on-the-job training program which used plant seniority as its preeminent nonracial qualifying factor. But, pursuant to a 1974 agreement between Petitioner Kaiser and Petitioner United Steelworkers of America ("Steelworkers"), separate racially segregated seniority lists were to be used for this purpose and only this purpose. An "entrance ratio" of one minority worker to one white worker was established for the program and was to continue until there was 39% minority representation in each craft. This figure was chosen because of its relation to the number of blacks in the area surrounding the plant.* As a result of this 50% quota, Weber's admission was denied. A black employee with less seniority was admitted to the program from which Weber was excluded solely because of his race.

"[T]he black employees being preferred over more senior employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their 'rightful place' in the plant." *Weber* v. *Kaiser Aluminum and Chemical Corp.*, 415 F. Supp. 761, 769 (E.D. La. 1977). "... Kaiser began to hire new employees 'at the gate' on a 'one white, one black' basis in 1969. The evidence further established that Kaiser had a non-discriminatory hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser." *id.* at 764.

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* There is a conflict in the opinions below as to whether the 39% figure represented "the percentage of minority population in the area surrounding [the] plant", *Weber*, 563 F.2d at 218, or whether it represented the percentage of the total minority work force in the surrounding area. *Id.* at 228. In either event the 39% figure was grossly in excess of the percentage of minority craft workers in the surrounding area.

There was a discrepancy between the proportion of blacks in the craft work force and the blacks in the plant as a whole, and between the proportion of blacks in the craft work force and the blacks in the community work force. But this discrepancy was not attributable to any racial discrimination by employer or union. ". . . Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen." *id.* at 764.

On these facts, the trial court ruled that the clear violation of Weber's rights under Title VII, §§703(a) and 703 (d), 42 U.S.C. §§2000e-2(a) and 2000e-2(d), to be treated without discrimination on grounds of race could not be justified or excused by any prior racial discrimination by Kaiser. It granted Weber's request to enjoin the use of the racial quota as a barrier to access to on-the-job training.

The Court of Appeals affirmed, holding: "It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race." *Weber,* 563 F.2d at 223. "There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the employment scheme." *id.* at 221.

This Court granted petitions for certiorari, Mr. Justice Stevens not participating, —— U.S. ——, (1978).

Summary of Argument

Title VII clearly established Weber's right to nondiscriminatory treatment as a candidate for on-the-job training. "Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority." *Weber,* 415 F. Supp. at 769. "It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race." *Weber,* 563 F.2d at 223.

The patent violation of Title VII cannot be justified either by the collective bargaining agreement or by Executive Order No. 11246, especially in the absence of any antecedent racial discrimination that had prejudiced the black applicants who were preferred over the white applicants. The attempted insertion of Executive Order No. 11246 as a basis for disregarding the specific mandate of Title VII raises serious constitutional questions which may be avoided by giving Title VII the plain meaning that the statutory language demands.

ARGUMENT

I

Title VII Prohibited Respondent's Exclusion From the On-the-Job Training Program Solely Because of His Race.

The record is clear that Respondent, because he is white, was denied admission to the on-the-job training program for which he was an applicant. Had he been black he would have been admitted. The segregation of employees by race for evaluating seniority qualifications was the sole cause of his exclusion.

It is equally clear that Title VII by its terms forbids the disqualification imposed on Weber because of his race. Section 703(a) and Section 703(d) are unambiguous in damning the exclusion of Weber as the segregatory racial quota did. Section 703(a) provides, in part:

> It shall be an unlawful employment practice for an employer—
>
> . . . to discriminate against any individual with respect to his compensation, terms, conditions of employment, because of such individual's race . . .; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .

Section 703(d) makes clear that this ban on racial classification by an employer is forbidden as to "apprenticeship or other training or retraining programs."

As the statutory language says, the right conferred on Weber not to be discriminated against on grounds of race was conferred on him as an individual and not as a member of a class. "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual*'s race, color, religion, sex, or national origin.' 42 U.S.C. §2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *City of Los Angeles, Dep't of Water* v. *Manhart*, —— U.S. ——, ——, 98 S.Ct. 1370, 1375 (1978); see also *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, ——, 98 S. Ct. 2943, 2951 (1978); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

That Title VII protects whites as well as racial minorities from discrimination on the basis of race was established by this Court in *McDonald* v. *Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). In *McDonald*, Mr. Justice Marshall stated,

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race,' (citation omitted). Its terms are not limited to discrimination against members of any particular race. . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' (citation omitted). . . .

427 U.S. at 278-280. *See Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S.Ct. 2733, 2811 n.12 (1978) (Stevens, J.); *Furnco Construction Corp.* v. *Waters*,

—— U.S. ——, ——, 98 S.Ct. 2943, 2951 (1978); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); see also *Uzzell* v. *Friday*, 558 F. 2d 727 (4th Cir. 1977), vac. and rem'd —— U.S. —— (1978), reaff'd —— F.2d —— (4th Cir. Feb. 2, 1979).

Petitioners' arguments seem to boil down to the proposition that Respondent's rights may be subordinated because there is a lack of racial balance within the plant. But this Court supplied the answer to that proposition only last Term in *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, ——, 98 S.Ct. 2943, 2951 (1978), when it said:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.* [401 U.S. 424, 430 (1971)]; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).*

This Court's understanding of the Civil Rights Act of 1964 as expressed in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971), should be dispositive of this case in Respondent's favor:

* This conclusion is all but compelled by §703(j) which provides in substance that nothing in Title VII shall require an employer to grant racial preference on account of a racial imbalance in the employer's work force. This section was part of the Dirksen-Mansfield compromise which resulted in the end of the Senate debate and the enactment of the Civil Rights Act of 1964. As Senator Humphrey explained in presenting it to the Senate:

> The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 Cong. Rec. 12295-12299 (1964).

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Here it is the fixed racial quota agreed to by Kaiser and the Steelworkers that has created a discriminatory racial barrier the removal of which is required by Title VII.

Similarly, if the issue were a constitutional one, which it would be if the racial quota were imposed because of governmental interference, whether by way of Executive Order No. 11246 or otherwise, the result would be the same.* As Mr. Justice Powell stated in announcing the judgment for the Court in *Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S. Ct. 2733, 2748 (1978):

> The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' *Shelley* v. *Kraemer*, [334 U.S. 1 (1948)] at 22. Accord, *Missouri ex rel. Gaines* v. *Canada*, [305 U.S. 337 (1938)] at 351; *McCabe* v. *Atchison, T. & S.*

* Concepts such as academic freedom and a diverse student body held in *Bakke* to authorize a limited consideration of race by universities are not applicable here.

F. R. Co., 235 U.S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

The racial quota here at issue is no less invidious because it would equally disqualify a black employee with a greater seniority than a white if his quota was already filled by a black with even greater seniority. In light of the longstanding (since 1969) hiring ratio "at the gate" of one black for one white, the possibility cannot be deemed a remote one. But, as this Court stated in *Shelley* v. *Kraemer*, 344 U.S. 1, 22 (1938):

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. It is, therefore, no answer . . . to say that the courts may also be induced to deprive white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Indeed, there would seem to be little quarrel that if Title VII is the controlling law—and it clearly is—the Respondent is entitled to the relief that the courts below afforded to him. The Petitioners seem to argue, rather, that Title VII is overridden by the terms of the collective bargaining agreement between Kaiser and Steelworkers and by Executive Order No. 11246. It is these propositions that we address next.

II

The Collective Bargaining Agreement Cannot Deprive Respondent of His Title VII Right to Nondiscrimination in Employment.

Amici wholeheartedly support voluntary affirmative action by employers and unions to assist racial minorities within the context of equal opportunity for all people. It matters little whether the affirmative action is undertaken altruistically or as a result of government prodding so long as the affirmative action techniques employed do not impair or destroy the ability of others fairly to compete for opportunities.

But, where as here, the mechanism for assisting minority employees is a fixed racial quota which segregates by race the opportunities for admission to a job training program and subsequent advancement, there arises an irreconcilable conflict between affirmative action and the principle of non-discrimination mandated by Title VII that no theory of voluntarism can rationalize.

Petitioners use of such phrases as "voluntary compliance" and "zone of reasonableness" are meaningless under the facts of this case. Nor can their reliance on the recently adopted Equal Employment Opportunity Commission's Affirmative Action Guidelines* incorporating these concepts legitimate the fixed racial quota here at issue. Whatever "voluntary compliance" with an anti-discrimination statute may mean, it cannot mean an agreement to discriminate. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Nor can the term "rea-

* 44 Fed. Reg. 4421 (1979).

sonable" be applied to a fixed racial quota that by its very nature is arbitrary in its treatment of individuals.* This is particularly so where, as here, the record is barren of any attempt by Petitioners to formulate a less invidious method to allocate scarce training opportunities.**

It is unrealistic to assume, as did Judge Wisdom in his dissent,† that the union can be counted upon to protect the civil rights of its white members in the face of a collective bargaining agreement demonstrating the contrary. The quota here at issue arose primarily out of Kaiser's desire to avoid "vexatious litigation"‡ and the union's apparent desire to obtain an on-the-job training program for its plant members even at the cost of having racially segregated seniority lists for this purpose. The 50% ratio agreed upon by Kaiser and the Steelworkers bore no relation to population or work force statistics; it was greater than both. The quota was in turn keyed to a goal of achieving 39% minority representation in each craft, a figure far in excess of the percentage of minority craft workers in the surrounding area. It is not surprising, therefore, that both courts below viewed the quota as unlawful even if it had been court imposed.

* The quota is arbitrary even in its treatment of racial or ethnic groups. See Mr. Justice Frankfurter's discussion in *Hughes* v. *Superior Court,* 339 U.S. 460 (1950); see also *Regents of University of California* v. *Bakke,* 98 S. Ct. at 2751 (Powell, J.).

** For example, instead of using racially segregated seniority lists, Kaiser and the union could have based admission to the program on seniority in combination with other relevant factors such as job performance, skill, aptitude, physical ability and a variety of other job related criteria that could have provided some degree of flexibility and individual consideration.

† *Weber,* 563 F.2d at 233.

‡ *Weber,* 415 F. Supp. at 765.

Where, as here, self-interested voluntarism clashes with the principle of non-discrimination, the latter must prevail.

As already shown, the Title VII right of Respondent to nondiscrimination on the basis of race in his employment is an individual right not a collective one. It is, therefore, not subject to divestment or destruction by a collective bargaining agreement between the individual's employer and his labor union. This is the lesson of *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977). The rule of supremacy of Title VII over collective bargaining terms was stated with particularity in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 51-52 (1974):

> We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [Citations omitted.] These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different grounds, it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights

> under Title VII are not susceptible of prospective waiver. [Citation omitted.]

The proposition that labor unions are disqualified from imposing racial discrimination by agreement with employers is a longstanding holding of this Court. In *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 203 (1944), the Court suggested that because the union operated under federally created collective bargaining powers, their contracting for racially biased terms verged on a constitutional violation:

> Without attempting to mark the allowable limits of differences in terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize bargaining representatives to make such discriminations. [Citations omitted.]

Whatever the power of employer and union "voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination" for specific victims of that discrimination, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 (1976), they have no power to nullify an individual's right to nondiscrimination where, as here, the two courts below found an absence of past racial discrimination by Petitioners.

The collective bargaining process by itself cannot repeal or defy the plain congressional mandate of Title VII. This

seems to be recognized by the Petitioners in their attempt to dress up the agreement as an expression of "affirmative action" authorized if not compelled by Executive Order No. 11246. But as we show in Point III, Executive Order No. 11246 cannot be a license to Kaiser and the Steelworkers to do what Title VII prohibits.

III

Executive Order No. 11246 Cannot Be a License to Kaiser and the Steelworkers to Destroy Respondent's Individual Title VII Right to Be Free of Racial Discrimination.

The attempt to fall back on Executive Order No. 11246 as the device for destroying Respondent's clearly delineated right under Title VII to be free from racial discrimination transforms the issue from one of statutory construction to vastly larger constitutional concerns. The argument based on Executive Order No. 11246 plays the role of Hamlet's father's ghost in these proceedings and it is equally nebulous.

There was no finding of employment discrimination by the agency charged with the enforcement of the Executive Order. (The only evidence in the record sustained the conclusion of the two lower courts that there was no prior racial discrimination at Kaiser's plant.) Nor was there any specific order for "affirmative action" either to Kaiser or to the Steelworkers. Nevertheless, it is suggested that simply because the Executive Order exists, authority has been delegated to Kaiser and the Steelworkers to institute a fixed racial quota in order to effect a racial balance

even in violation of Title VII. There is, of course, no authority to support such a position.

Before addressing the questions intrinsic in the attempted repeal of Title VII by Executive Order No. 11246, it might do well to look at the substantive content of that Order. It provides, 30 Fed. Reg. 12319 (1965), in relevant part, only that: "The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." It is a broad jump from the terms of the Executive Order, which are perfectly consonant with the language and commands of Title VII, to read it as commanding racial discrimination in employment by way of a racial quota. The more natural reading is its consistency with Title VII in banning the racial discrimination inherent in the quota imposed by the collective bargaining agreement here at issue.

Such a reading preserves government encouraged affirmative action for racial minorities while recognizing the fundamental right of every individual to compete for employment opportunities free of racial discrimination—the essence of Title VII. Without the former, equal opportunity for all people might never become a living reality. Without the latter, progress in civil rights would be reduced to the level of political expediency and could prove ephemeral indeed.

If not read in a manner consistent with the nondiscrimination requirements of Title VII, the Executive Order No. 11246 raises the spectre of three substantial con-

stitutional questions, none of which has been directly resolved by this Court.

The three questions are: (1) Is Executive Order No. 11246 valid in the absence of either a constitutional or statutory base on which to rest? (2) Is an Executive Order which is in conflict with a statutory command superior to that statutory command? (3) Is an Executive Order valid that purports to impose a racial quota making employment rights dependent exclusively upon race, especially when there is no violation to which the quota might be addressed as a remedy? The answer to all three questions must be in the affirmative if Petitioners' claims as to the applicability of Executive Order No. 11246 to the facts of this case are to be sustained.

The principal authority invoked by Petitioners is a decision of a Court of Appeals that is clearly distinguishable. *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, 163-65 (3d Cir. 1971), involved a particular set of "goals" imposed on particular unions and employers by a federal agency that had made specific findings of prior racially discriminatory hiring practices. There is, thus, little similarity to the case at hand, where there is neither a finding of past discrimination nor action by an agency specifying a remedy for such discrimination.

The "Philadelphia Plan" in *Contractors Ass'n.,* moreover, was held by the Third Circuit to be concerned with flexible "goals" and not, as here, a fixed quota. These "goals" were concerned with increasing the number of minorities in a labor pool available for employment and it was specifically found in that case that there was no

conflict with Title VII, because: "Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen." 442 F.2d at 173. The fixed quota imposed here could hardly qualify as a "goal," and it surely cannot be said that the quota did not in fact exclude Respondent from the training program in favor of a black applicant with less seniority solely because of his race.

It is implied that the necessary findings of discrimination to justify the racial quota as a remedy were implicitly made by the employer and the union. They have neither authority nor competence to perform that function. As Mr. Justice Powell said in *Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S.Ct. 2733, 2758-59 (1978):

> Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structure are not competent to make these decisions, at least in the absence of legislative mandates and legislatively determined criteria. [Citations omitted.] Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discriminations. [Citations omitted.] Lacking this capability, petitioner has not carried its burden of justification on this issue.

Surely, the labor union and the employer are hardly better positioned to exercise the governmental function that the

Medical School at Davis could not exercise "in the absence of legislative mandates and legislatively determined criteria."

We submit that the answer to each of the three questions is in the negative and if we are right on any of them, judgment for Respondent should be affirmed.

1. This Court has held that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). Here, as in *Youngstown*, the Executive Order in question is without either constitutional or statutory justification. It is a naked act of legislation by the executive branch, exactly of the kind held invalid in *Youngstown*. See *id.* at 588.

It is true that the Third Circuit in *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 166-72 (1971), sustained the validity of the Order, but it did so by resorting to the standard in Mr. Justice Jackson's concurring opinion rather than the quoted standard announced by Mr. Justice Black in his opinion for the Court. There was not, as there could not be found any constitutional or statutory provision on which to rest the Order.

2. *Youngstown* also furnishes the answer to the second constitutional question raised by the assertion of the supremacy of the Executive Order over the mandate of Title VII, at least as that Order is interpreted by Petitioners. For even by the standards of the concurring Justices, who constituted a majority of the Court, an Executive Order

in conflict with national legislation must be subordinated to that legislation. See *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); Frankfurter, concurring, *id.* at 593; Douglas J., concurring, *id.* at 629; Jackson, J., concurring, *id.* at 634; Burton, J., concurring, *id.* at 655; Clark, J., concurring, *id.* at 660. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." Article VI, §2, Constitution of the United States.

3. The arguments and proofs that a racial quota which does not purport to be a remedy for constitutional or statutory violations is itself unconstitutional is set out fully and cogently in Mr. Justice Powell's opinion in *Regents of University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978). See *Swann* v. *Board of Education*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Evans* v. *Buchanan*, 555 F.2d 373 (3rd Cir. 1977).

A racial quota is an unconstitutional governmental tool because it tells us that the only attribute about a person that qualifies or disqualifies him for employment or other societal good is the color of his skin. The use of race as a surrogate for unidentified capacities or incapacities is both intrinsically invidious and factually false. The use of a racial quota pursuant to governmental mandate makes a mockery of America's long sought constitutional goal that all individuals are to be treated by the law as if there were no difference in the color of their skins.

None of the three constitutional issues mentioned here need be addressed by the Court if the plain meaning of Title VII is applied by the Court to the facts of this case. Certainly statutory construction should be preferred to constitutional adjudication here. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

IV

Whether or Not There Had Been Past Discrimination in Employment at the Kaiser Plant, the Racial Quota Imposed by the Collective Bargaining Agreement Would Be Invalid.

Petitioners have sought to turn Title VII on its head by asserting that deprivation of Respondent's Title VII rights are not at issue. For them, the question is whether a racial quota is an appropriate remedy for a statistical racial imbalance among craft workers at Kaiser's Gramercy plant even though actual discrimination is steadfastly denied, and no discrimination was found by the two courts below.

If there is a central meaning to be derived from the judgment of this Court in *Regents of University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978), it is that a quota is not an approvable remedy under such circumstances. As Mr. Justice Powell wrote there, —— U.S. at ——, 98 S. Ct. at 2759:

> Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like the respondent, who bear no responsibility for

> whatever harm the beneficiaries of the special admissions group are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violation of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure or to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. [Citation omitted.]

Surely the "discrimination" claimed here cannot afford a justification for "relief" beyond that which could be invoked to cure a statutory or constitutional violation, had there been one. It is clear from this Court's previous decisions that the racial quota invoked by the collective bargaining agreement could not stand even if used to cure defined violations of law.

As the Court of Appeals for the Fifth Circuit noted in its opinion: "The Supreme Court has never approved the use of a quota remedy." *Weber,* 563 F.2d at 220. Indeed, even in the case of a constitutional violation, this Court has said that a quota in terms of a fixed racial balance is a "remedy" beyond the discretion of a court to impose. The lesson of *Swann* v. *Board of Education,* 402 U.S. 1 (1971), and *Milliken* v. *Bradley,* 418 U.S. 717 (1974), was clearly stated by Judge Aldisert speaking for the Court of Appeals for the Third Circuit sitting *en banc* in *Evans* v. *Buchanan,* 555 F.2d 373, 379, 380 (3d Cir. 1977):

> Nor may a remedial desegregation order require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing. . . . The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann* v. *Board of Education, supra,* 402 U.S. at 24. . . . If that language were not clear enough, the Supreme Court has more recently repeated that "[t]he clear import from this language in *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom' " *Milliken* v. *Bradley,* 418 U.S. at 740-41. . . . Accordingly, and to avoid any possible misunderstanding, we expressly disapprove the 10-35% enrollment criterion, and we specifically hold that no particular racial balance will be required in any school, grade, or classroom.

This Court, moreover, has been absolutely consistent in its position that remedies for racial discrimination must be framed only to cure discrimination that violates the law. Thus, it has assured the restoration of victims of racial discrimination to their "rightful place," *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 779 n.41 (1976), or the right of such victims to be "made whole," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975). But even established acts of racial discrimination are not a license to the government, no less to an employer and union, to allocate benefits and burdens exclusively on the basis of race. If there were past illegal discrimination, the only appropriate remedy would be to restore those shown to be injured by illegal racial discrimination to the condition they would occupy but for the illegal discrimination. See, *e.g., Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772-73 (1976); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 364-71 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977). Even under such circumstances, this Court has admonished the lower courts, in shaping a remedy to be mindful of the equities

of fellow employees who were not responsible for the discrimination. *International Brotherhood of Teamsters* v. *United States, supra* at 372. See *Regents of University of California* v. *Bakke,* 98 S. Ct. at 2751 n.34.

Whatever past inequities Petitioners may assert on facts outside the record, they provide no predicate for a fixed racial quota. Nor can the racially segregated selection process here at issue be justified as appropriate affirmative action, either voluntary or government required. If the principle of non-discrimination, so vital to the security of all minority groups, racial and otherwise, is not to become a legal fiction, Respondent must be confirmed in his on-the-job training post without an egregiously unlawful racial quota barring his way.

Conclusion

The civil rights movement and the body of law it inspired, aimed at eliminating racial inequities, are among the most significant and constructive developments in this nation's history. If the concept of affirmative action, voluntary and government inspired, has served as the stimulus for social progress, the principle of non-discrimination has provided the legal and moral underpinning for such progress. The latter teaches that every individual, regardless of race, is entitled to compete for opportunities on his or her own merits, not as a matter of political expediency or business convenience, but because discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. This fundamental truth must become an integral part of the mores of our society if we are ever to be free of racism.

Yet, in the impatience to complete the abolition of discrimination based on race there is the tendency to sacrifice principle for expediency—here the principle of non-discrimination itself—for the beguiling simplicity of a fixed racial quota. It would be self-defeating in the extreme, if legislation and executive decrees, which by their terms clearly afford no support for racial quotas, were held to countenance the invidious racial quota imposed here. The decision of this Court in this case may well determine whether the drift to a quota society will become a tragic reality.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 1 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435, 78-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL
CORPORATION, AND UNITED STATES OF AMERICA,
RESPONDENTS

KAISER ALUMINUM & CHEMICAL
CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICAL AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE
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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, petitioner, v. Brian F. WEBER et al.
No. 78-432

KAISER ALUMINUM & CHEMICAL CORPORATION,
petitioner, v. Brian F. WEBER, et al.
No. 78-435

UNITED STATES et al., petitioners,
v. Brian F. WEBER et al.
No. 78-436

BRIEF OF AMICUS CURIAE
Pacific Civil Liberties League

INTEREST OF THE AMICUS CURIAE

The Pacific Civil Liberties League is a forum formed in 1978 by David J. La Rivière, an American of Acadian descent, in order to provide a voice for oppressed Americans of his heritage. This Amicus Curiae is interested in this particular legal action, as it is public knowledge that Brian F. Weber is an American of Acadian descent,[1,2] This Amicus Curiae is further interested in this legal action, as David J. La Riviére, now has pending a legal action alleging deprivation of CIVIL RIGHTS on account of race, in the U.S. District Court for the Northern District of California. This legal action, which is entitled *David La Riviére v. EEOC et al.*, C-75-2692 RHS, questions the right of the Equal Employment Opportunity Commission and the U.S. Department of Labor to require employers to annually report the specific numbers of Blacks, Orientals, and Spanish-Surnamed-persons in their employ – without also requiring employers to report the numbers of French-Canadian-Americans or Acadians so employed. It is the contention of this Amicus Curiae that such disparate treatment of ethnic minorities in the U.S. is not validly based upon socio-economics and history. Further, if Americans of Acadian descent were to be judged by the same standards that one might judge the "qualifications" of EEOC-defined "minorities" to be classed in "specially protected" categories; it would become obvious that Americans of Acadian descent as a group are in greater need for true protection than several of the presently protected groups. It is further the contention of this Amicus Curiae, that the above-mentioned disparate classifications, as well as a myriad of associated Federal government

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[1] Weber is described in the Dec. 25, 1978 issue of *Time*, page 44, as being "a loquacious cajun . . ."

[2] The word Acadia as defined by *Funk & Wagnall's* means "A former name for a region in Eastern Canada," and also a parish in Louisiana settled by deported Acadians. The term "Acadian" is defined as one of the early French settlers of Acadia or their descendants.

employment policies and regulations, have the effect of depriving Americans of Acadian ancestry, and many others of effective American Citizenship.

In order to fully explain the interest of this Amicus Curiae, a short history of Acadia – the land of the ancestors of today's "Cajuns," will prove illuminating.

Early in the 18th century England acquired the formerly French colony of Acadie, or Acadia, as a part of the peace settlement of the War of Spanish Succession. The Acadians living in the territory, who were themselves, a mixture of French colonists and Mic Mac Indians, continued to live – for about 50 years under English occupation. In 1755, the British navy with the aid of American Colonials, forcibly seized many of the Acadians while they were in churches throughout Acadia. Those seized by the Anglo-Americans were deported to various ports in the Carribean. From 1755 until 1763, more than 10,000 Acadians were forcibly exiled, while many of them died from shock, sickness, starvation, or brutality, a new colony of Acadians eventually became established in Louisiana.

Although most of the Acadians were seized during the years 1755 to 1763 by the Anglo-Americans, several thousand Acadians did manage to escape into the wilderness of what is today Aroostock County in the extreme Northern tip of Maine.

Americans in the meantime occupied the farms and towns of Acadia. Included in the territory of Acadia was most of the present Maritime Provinces of Canada and the present Counties of Hancock and Washington on the Maine coastline. The Acadians were not allowed to return to their homes, nor were they compensated for their loses by any government.

Of those Acadians who had escaped from the Anglo-Americans, a portion of these refugees emigrated to Quebec, with the remainder establishing said community located in the upper

reaches of the St. John's River Valley. This community independently flourished until the United States seized effective control of the area in the 1850's. The United States occupied the portion of Nouvelle Acadie located on the right bank of the Upper John's River Valley while Canada occupied the left bank. The Acadians of Nouvelle[3] Acadie protested their incorporation into the United States to no avail. Today these Acadians still live in the upper reaches of the St. John's River Valley, speaking a dialect of French and eking out an income which is far below the national median.

This Amicus Curiae's purpose in submitting this brief is to bring to the attention of this Court the fact that the selection of "minorities" by the EEOC and the U.S. Dept. of Labor was both caprious and unjust. Further, that without considering the future effect of preferential "affirmative action" programs on excluded American minorities, such as French-Canadian-Americans of Acadian descent; this Court will be encouraging these racially partisan government agencies to continue to unreasonably advocate that employers grant favorable and disparate treatment of selected minorities, in violation of Title VII of the Civil Rights Act of 1964.

It is sincerely hoped that this brief will contribute to the knowledge of the Court in regard to the socio-economic and historical background of those persons in Gramercy, Louisiana and elsewhere, who belong to Brian F. Weber's class.

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[3] For the history of the deportation of the Acadians, the seizure of Nouvelle Acadie by the United States and Canada and Canada's seizure of French-Acandian-Metis-Indian lands in the 1880's see, *Histoire des Franco Americains,* publié Sous les Auspices de L'Union Saint-Jean Baptiste d'Amerique, par Robert Rumilly de L'academie Canadien-Francaise et aussie *Histoire des Acadiens* (2 vol., 1955) par le Meme auteur.

STATEMENT OF THE CASE

This Amicus Curiae adopts the counter-statement of the case, as set forth in the Respondent's brief in opposition to the Petition for Certiorari.

QUESTION PRESENTED BY THIS AMICUS CURIAE

Do the EQUAL PROTECTION CLAUSE and TITLE VII grant Americans of Acadian ancestry the same protection against discrimination in employment as that granted to Blacks, Hispanic Americans, and Orientals?

INTRODUCTION

This case involves a blatant and flagrant instance of race discrimination in employment. There is no question of evidentiary sufficiency; indeed the perpetrators admit their actions. However, the act was committed, and this litigation had to be brought, because of an element in the discrimination involved which – according to the perpetrators – transforms what would otherwise be a clear-cut breach of the Constitution into a deed not only permissible but indeed praiseworthy. The perpetrators feel justified in having Weber, an American of Acadian descent, sacrifice employment opportunities and income so that Blacks, Orientals, and Hispanics can have increased opportunities and income. The perpetrators, who also happen to be the petitioners in this action hold that Weber's sacrifice is necessary in order to make Blacks, Orientals, and Hispanics whole, from the effects of prior discrimination. The prior discrimination which the perpetrators and petitioners refer too, has been denied by Kaiser, the employer of Weber, which also admits granting special privileges of employment to lesser qualified Blacks. Kaiser admits denying Weber a position as a special trainee, even though Weber had greater seniority than several of the Blacks selected. Other than race, seniority was the only criteria used in selecting applicants for said special training position.

Weber brought suit in the U.S. District Court, E.D. Louisiana, against both Kaiser Aluminum & Chemical Corp., and the Union which had negotiated the above-noted special employment privileges for "minorities," United Steelworkers of America AFL-CIO.[4] The district court held for Weber.

Kaiser and the Union appealed the decision of the District Court to the Fifth Circuit United States Court of Appeals. The Court of Appeals affirmed the decision of the District Court, adding that as the "affirmative action" program was voluntary, a change in the Congressional legislation regarding Title VII would be necessary in order that Kaiser's program would not be violative of Sec. 703(a) and (d) of Title VII.[5] Kaiser and the Union petitioned the Fifth Circuit Court for rehearing, which was denied on April 17, 1978.[6]

Kaiser, the Union, and now the United States have joined as petitioners asking this Court to further consider the case in light special evidence, including statistical evidence of discrimination against Blacks at the Kaiser plant in Gramercy, La.[7]

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[4] *415 F. Supp. 761 (1976)* This action was brought for injunctive relief from effects of illegal discriminatory employment practices alleging that collective bargaining agreement had established quota system which discriminated against nominority members of plant labor force in violation of Civil Rights Act of 1964. The District Court, Jack M. Gordon, J., held that where black employees who were being preferred over more senior white employees under quota system had never themselves been subject of any unlawful discrimination during hiring, such black employees occupied their "rightful place" in plant and thus affirmative action quota system was inappropriate and violated unequivocal statutory prohibitions against racial discrimination against any individual.

[5] *563 F. 2d 216* (1977)

[6] *571 F. 2d 337* (1978)

[7] It appears that the EEOC wants the case remanded back to the District court for a trial which would consider these special considerations.

The petitioners are hardly disinterested in their own hides. Each of these petitioners is heavily committed to the maintenance of the present program whereby selected racial groups are arbitrarily granted many privileges of citizenship not enjoyed by excluded groups. Americans of Acadian descent have seen the "affirmative action" program grow from employment, to education, to criminal justice, to the granting of government laons and contracts, to the granting of FCC licenses to broadcast. For a group which was already in the lower rungs of society anyway, having far fewer professionals and a much lower median income than average, the exclusion of Americans of Acadian descent from the "affirmative action" program was and is, a harshly repressive measure.[8]

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[8] One of the finest statements on why quotas are wrong was made by John H. Bunzel of Stanford University. His main points, which apply to all discrimination may be summarized as follows:

1. Although alledgedly intended to eradicate discrimination, quotas are really a new form of discrimination.
2. The use of bad means to achieve supposedly good ends is self-defeating and destructive.
3. By leading people to believe that discrimination can be fought by relatively mechanical means, quotas will reduce the incentive for reform.
4. By destroying the principle that merit should be supreme, quotas obliterate the only possible objective legal standard on which a finding of discrimination can be based.
5. Quotas destroy the common set of rules which holds America together – solely on the basis of group identity – at the expense of innocent.
6. Quotas intensify polarization and antagonism among groups. Victims will hate the beneficiaries.
7. Quotas require heavy-handed governmental classifications of our private and personal characteristics, and, by the intrusion of the state, thrust considerations of these traits into decision-making processes where such matters as race, sex and ethnicity should be irrelevant.

J. Bunzel, "The Quota Mentality," *Freedom at Issue* (Nov.Dec.1973)

ARGUMENTS

THE CLASS TO WHICH WEBER BELONGS, WAS UNJUSTLY AND CAPRIOUSLY DENIED CLASSIFICATION AS A "PROTECTED MINORITY GROUP" BY THE EEOC AND THE U.S. DEPT. OF LABOR, THUS ESTABLISHING A FALSE BLACK-WHITE QUOTA SYSTEM.

A. The selection of particular "minority groups" by the EEOC and the Dept. of Labor was not based upon valid socio-economic or historic principles, which could be justified to the point of excluding WEBER's Class. The fact is that several "minority" groups included in the EEOC's reporting requirements have much less objective reasons for being "protected" than would Americans of Acadian descent.[9]

B. The fact that Caucasian groups, or those groups the EEOC perceives as being Caucasian are not homogenous in income, socio-economic characteristics and history leaves the lower income "Caucasian groups" at the grave disadvantage of

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[9] From a report published by the United States Commission on Civil Rights (August 1978) entitled *Social Indicators of Equality for Minorities and Women,* the astounding revelations concerning Japanese, Chinese, and Philipino Americans will certainly interest this Court. This report indicates that Japanese-American and Majority households had the following median household Per Capita Income:

	1959	1969	1975
Japanese-Americans	$1680	$3184	$6105
Majority	$1472	$2601	$4333

Although there is no published material regarding the precise Per Capita Income of Americans of Acadian descent which is Known to this Amicus Curiae, it would appear that both Francophones (French speaking people) and Americans of Acadian descent (many of whom are not presently French speaking) have a Per Capita income below that of the American "majority," as they essentially are concentrated in low-income states such as Louisiana, New Hampshire, Maine, and Rhode Island. And further because their numbers are largely absent from high income professions.

having to accept the median "Caucasian income and unemployment rates" as those which preferred "minorities" can attain by legal redress, but not themselves.[10,11]

C. If an employer employs a disproportionately small number of EEOC-defined minorities the burden of proof automatically falls upon the employer to prove that reason for such low parity was non-discriminatory, however, the reverse is not true.[12,13,14]

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[10] The report noted in Reference No. 9, further indicates that unemployment among Japanese-Americans has averaged less than half of the majorities' average during the years 1960, 1970, and 1976. The following is an extract from Table 2.4, showing the percentage of persons from 25 to 29 years of age who have completed at least 4 years of college:

	1960	1970	1976
Males			
Japanese-Americans	35%	39%	53%
Chinese-Americans	49%	58%	60%
Philipino-Americans	19%	28%	34%
Majority	20%	22%	34%
Females			
Japanese-Americans	13%	31%	35%
Chinese-Americans	26%	42%	44%
Philipino-Americans	16%	50%	51%
Majority	9%	14%	22%

[11] Representative Waxman (Dem. – Los Angeles, Ca.), states: "Though only 3% of the national population (Jews), they are grossly over represented in law, medicine, accounting and the academic professions." He further states: "Has this overrepresentation been obtained illegitimately or does it represent unique aspects of American Jewish Culture and experience?" *L.A. TIMES,* May 1, 1975. Mr. Waxman raises the question of whether a professionally over-represented ethnic group should be penalized when it appears that this group has obtained it's place in society legitimately. This Amicus raises the same question with respect to Brian Weber's Class.

[12] The EEOC advises employers that they have a duty to maintain parity in favor of EEOC defined minorities – and not to others. See *Affirmative Action and Equal Employment, A Guidebook for Employers,* Vol. 1 & 2 printed by the EEOC, Jan. 1974.

D. Persons of WEBER's Class have been historically and continuing into present times have been persecuted in the United States. The United States Dept. of Justice, the EEOC, and the Dept. of Labor choose to ignore the persecution of French-Canadian-Americans & Americans of Acadian descent. A disturbing example of the above noted persecution is/was the April 19th 1976 racial attack on two French-Canadian-Americans, in Boston, Massachusetts, by a Black mob. Richard Poleet, then 34, was dragged from his auto and beaten on the head with a brick.[15] He remained hospitalized in poor condition for almost a year before he died. His face had been crushed and more than 40% of his brain had been removed in four operations. The second victim. Linda Bourdreau, then 17, suffered a

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[13] If the French population of Canada can be compared to the Acadian population in the United States, in socio-economic characteristics, the EEOC would be hard put to defend it's exclusion of Americans of Acadian descent from the "affirmative action"program. In a recent speech Prime Minister Pierre Trudeau stated: "The population of Canada is 27 percent Francophone. Yet even by the early 1970's studies showed that the national proportion of French Canadian senior executives was less than 9 percent in the corporate sector, and less than 15 percent in the Federal public service. The population of Quebec is more than 80 percent French-speaking. Yet out of Quebec's largest 100 business firms, only four have five or more French Canadian senior executives – and 43 of these firms do not have a single French Canadian in their senior ranks." See "What Quebec Really Wants", *TORONTO STAR,* (August 1977)

[14] The fact that the EEOC perceives Americans of Acadian ancestry as "Caucasian" does not belie the fact that the early settlers of Acadia were of mixed French and Indian blood and that no person of Acadian ancestry can claim to be purely White.

[15] For an account of this gory episode regarding persecution of Americans of Acadian descent, see "Ex-Wife's Plea for Victim of Boston Racial Beating," *S.F. Chronicle,* May 13, 1976. For an interesting analysis of how the American press unfairly reports the above racial beatings of Acadian Americans see the *Oakland Tribune's* front page April 6, 1976 article concerning a Black in Boston who was beaten and received a broken nose (12 column inches and three photographs) as compared to the one inch, page 2 article in the *Tribune,* of April 24, 1976, concerning Poleet.

fractured skull when she was attacked by another Black mob, while she was in her car in a Boston Housing Project. Many of these murderers continue to walk the streets.

The statistics which indicate that Americans of Acadian descent are in similar need of protection as that of the EEOC selected minority groups have been ignored by the EEOC. A report submitted to the EEOC in 1973 by the New Hampshire Commission on Human Rights, which strongly indicated that Americans of French-Canadian descent were underutilized in the professional categories of employment, has not prompted the EEOC into classifying Americans of Acadian descent as a protected group similar to Spanish-Surnamed-Americans.[16]

Further, the lack of mandatory reporting requirements for the various groups of persons of Acadian descent in the United States, has handicapped any effort to prove the disparities which this Amicus believes exist.

What few indices of comparison that are available reflect a lower than average mean income for Americans of Acadian descent, a lower percentage of government employment and a lower educational attainment level.[17]

[16] The October 15, 1973 New Hampshire Commission on Human Rights Report concerning French and non French-workers in the State of New Hampshire; shows a grave statistical disparity existed in 1972-73 which reflected the grossly inferior employment classifications of the French. In New Hampshire, which is approximately one-third French-Canadian-American and 15.2% Francophone, the above report indicated that 36.24% of the New Hampshire workforce was French-Canadian-American. Although having 36.24% of the workforce, they had less than 3% of the office managers, less than 18% of the professionals, less than 8% of the technicians. Conversly non-French White males having 38.94% of the work force had 97.45% of the office manager positions, 82.23% of the professional positions, and 93.45% of the technical positions. This report is obtainable from the New Hampshire Commission of Human Rights, 66 South Street, Concord, New Hampshire.

[17] Only 4.1% of the Francophone population of Main, aged 25 years or older, had in 1970, a college education of four or more years. This compares to 9.4% for the same group in the English speaking community. In addition, the figures for Francophone persons aged 25 years or older, in 1970, having an elementary school education or less was 42.9% of this group, while the figure for the English speaking population was 17.6% for the same age group in 1970. See page 7 of *Social & Economic Profile of French and English Mother Tongue Persons – Maine* 1970 by Madeleine Giguère, University of Maine at Portland.

Madeleine Giguère further indicates that far few Francophones were employed as government workers in the Federal, State and Local governments in Maine in 1970, than their English speaking counterparts. The following is an extract from page 9, Supra:

Class of Worker for
MOTHER TONGUE GROUPINGS: Maine, 1970
(percent)

	English	French
Total Employed	100.0	100.0
Government Worker	16.6	10.2
Federal	5.1	3.8
State	4.1	2.5
Local	6.9	3.9

In addition, Madeleine Giguère indicates at page 12, Supra, that the mean personal income for Francophones in Maine in 1970, was much lower than for English speaking persons. For instance, she indicates that the average mean income of a Francophone male college graduate was $6,560 in 1970, as compared to $8,266 for the average mean for the English speaking male college graduate.

E. Title VII has been administratively interpreted in favor of EEOC selected minorities – without any basis except EEOC promulgations. If the EEOC's own employment practices can be taken as an example of how it wants employers to obey Title VII, then this nation will have an interesting future.[18] The use of the EEOC-definition of "minority" and the Title VII requirement compelling those who wish legal redress to file

[18] The EEOC itself employs mostly EEOC defined minorities. Of the 2,359 EEOC employees reported to the U.S. Civil Service Commission in Nov. 1976, only 17.3% were Caucasian males, and only .6% were Native Americans. See *Minority Group Employment in the Federal Government.* Nov. 1976, published by the United States Civil Service Commission.

complaints through the EEOC, have a chilling discriminatory effect on Americans of Acadian ancestry. In order for Brian Weber to receive a fair re-trial at the District Court level or the appellate level, his class would also have to be defined as "minority" and the investigative and legal functions of the EEOC, as set forth in Title VII, would have to be free of racially partisan prejudice.[19]

SUMMATION OF ARGUMENTS

Presently Title VII does not in fact protect Americans of Acadian descent, because the agency charged with administering Title VII, the EEOC, has not taken the administrative steps necessary to effect such protection. The unfair and arbitrary exclusion of Americans of Acadian descent and many other groups was not based upon valid socio-economic and historic principles which could withstand the scrutiny of legal examination. The fact that many excluded minority groups, including the class to which Weber belongs, have been seriously damaged in morale and in their rightful place in society, cannot be seriously challenged. The previous quotation from Representative Waxman regarding the overrepresentation of Jews in American professional life, should not be an indictment of Jews for the hard work and native intelligence of the individual Jews involved. The fact remains that not only Jews, but also Congregationalists, Episcopalians, Unitarians and others have as groups been disproportionately successful in American life. To average essentially lower income ethnic groups such as Americans of Acadian descent and Portugese Americans with essentially wealthy groups is unjust in the extreme, when the

[19] See "Black Muslims Keep Jobs, Money in Black Community" for an interesting article on how Black businesses can "keep both jobs and money flowing in the Black community." May, 1 1975, *Christian Science Monitor*, Western Edition.

purpose of such averaging is to determine the legal redress rights of specially protected ethnic groups. Some of these specially protected groups are low income, but three of the groups show marked signs of not needing any extra help. Japanese-Americans in particular, are recipients of "affirmative action" largess, when it appears that Americans of Acadian ancestry, or for that matter, most American groups, have a better statistical argument for "protection."[20] From a historical point of view the Japanese-Americans may have a point, but then again, so do Americans of Acadian descent. The three differences between what happened to the Japanese-Americans in World War II, and what the Anglo-Americans did to the Acadians are:

1. What happened to the Japanese occurred during wartime as opposed to the Acadian deportation.
2. The Japanese were given a measure of compensation, the Acadians were not.
3. The Japanese were for the most part allowed to return to their homes, the Acadians were not.

The American Legacy of Discrimination and persecution of Weber's Class prejudices the case of the petitioners. As both the Union and Kaiser voluntarily cooperated with the "affirmative action" program promulgated by the EEOC and as this program has from it's inception excluded Americans of Acadian descent; these petitioners are not now in a position to disclaim responsibility for the alleged misdeeds which are the root arguments for all the petitioner's self-flagellation. These misdeeds if in fact they exist, should not be borne by Weber, as his class has historically been subject to at least as much deprivation as several of the groups which petitioner's recognize as being rightfully entitled to special protection of the law.

[20] An avowed opponent of the "Affirmative Action" program, Senator Hayakawa says that Japanese-Americans have achieved what they wanted most – "Equality of opportunity." *San Jose Mercury*, Feb. 25, 1979, page 1. Also see references 10 & 11 supra.

CONCLUSION

This Court should order the petitioners to obey the directives of the original order of the District Court.

Respectfully,

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MOTION FILED
MAR 8 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

No. 78-436

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR GREAT PLAINS LEGAL FOUNDATION

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Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *et seq.*:

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY GREAT PLAINS LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Great Plains Legal Foundation pursuant to Supreme Court Rule 42 and moves for leave

to file the attached brief *amicus curiae* in Cause Nos. 78-432, 78-435 and 78-436.

Great Plains filed a brief *amicus curiae* by leave of the court in the Fifth Circuit Court of Appeals below. Written consent to file this brief in the Supreme Court was obtained from petitioner, Kaiser Aluminum and Chemical Corporation and respondent, Brian Weber. The Solicitor General advised Great Plains that he would not consent on behalf of the United States and the Equal Employment Opportunity Commission to this brief, but did advise Great Plains that it could advise the Court that he would not oppose this motion seeking leave to file a brief *amicus curiae*. The United Steelworkers Union has not responded to Great Plains' request for consent to file this brief.

Great Plains Legal Foundation is a publicly supported, not-for-profit corporation engaged in nonpartisan legal research, study and analysis for the benefit of the general public on the effect of evolving concepts of law on our democratic institutions. It provides legal representation, without charge, to individuals and organizations at all levels of the judicial and administrative process. It is particularly involved in matters where institutional or governmental policy interferes with individual rights and liberties. While as a matter of policy, Great Plains Legal Foundation abhors discrimination of any kind, it is concerned that activities ostensibly designed to eliminate discrimination, may in fact foster group rights as opposed to individual rights which it champions.

Great Plains has previously participated *amicus curiae* in litigation involving Titles VII and IX of the Civil Rights Act. In addition, it has participated in rulemaking proceedings involving Title VII before the Equal Employment Opportunity Commission.

Great Plains submits that the present case has far-reaching policy implications beyond the particular interest of the private parties.

While the Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission, purports to represent the public interest, Great Plains believes that the interest of a broad segment of the American public is contrary to the argument advanced by the Solicitor General. Great Plains submits that this public interest is presented in its attached brief and that its brief will be of material assistance to this Court.

For these reasons, Great Plains Legal Foundation respectfully urges the Court grant this motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF AMICUS CURIAE

ARGUMENT

The Court is called on to determine whether it is a defense to discriminatory conduct which on its face violates Title VII of the Civil Rights Act of 1964 that the discrimination occurred pursuant to a company/union agreement designed to enhance minority employment in certain positions.

As the government concedes, there can be no doubt that Brian Weber, and the class he represents, established a prima facie case of racial discrimination in employment. Kaiser and the Steelworkers Union by agreeing that promotions from laborer positions to a craft training program would depend not only on plant seniority, but also on race, violated both the general proscriptions against employment discrimination of Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), and the express language of Section 703(d), 42 U.S.C. 2000e-2(d), which provides that it is an unlawful employment practice to discriminate against any individual because of his race in admission to apprenticeships and on the job training programs.

The government contends that the racial quota system adopted at the Kaiser Gramercy Plant is unobjectionable because, given a statistical disparity in minority employees at the plant, a court could fashion a remedy under its equitable powers conferred by Section 706(g) of Title VII which would be similar to the quota system which the company and the union established.

The Steelworkers forcefully contend that a quota system to alleviate minority under-representation is an appro-

priate result of the collective bargaining process, although such a system is beyond the jurisdiction of a Title VII court to decree as remedy for established violations of Title VII. Kaiser argues that it was entitled to agree to a quota system, and in fact was under "compulsion" to do so in order to keep government contracts and to forestall Title VII suits and liability.

We submit that each of the justifications for the quota system fails to establish a defense to Mr. Weber's prima facie case of discrimination and that therefore he is entitled to prevail.

A. Section 706(g) of Title VII Does Not Authorize an Employer and Labor Union to Establish Racial Quotas

The authority of Kaiser and the Steelworkers Union to adopt an affirmative action plan which coupled seniority with race for the purpose of determining which employees were entitled to be admitted into a craft training program at the Gramercy Plant cannot be derived from a court's authority to order affirmative action under Section 706(g). A court under that section would not have such power for three reasons: (1) neither Kaiser nor the Steelworkers engaged in unlawful employment practices at the Gramercy Plant; (2) no victims of past discrimination are made whole or restored to their rightful place by the plan; and (3) the plan is not premised on factual findings which justify the burden it places on nonminority workers such as Mr. Weber.

Section 706(g) permits the ordering of "such affirmative action as may be appropriate" only "[i]f the court finds that the respondent is intentionally engaging in an unlawful employment practice charged in the complaint."

Thus, relief cannot be ordered until it has been proved that the employer, or union, has followed an employment practice of unlawful discrimination, *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 361. Since courts have no power pursuant to Section 706(g) to order affirmative relief when there is no discrimination, it follows that private parties claiming to derive their power from the power of courts under Section 706(g) are limited to cases of actual discrimination. In the present case, the right of Kaiser and the Steelworkers Union to act pursuant to 706(g) fails, if it ever existed, because, as the majority opinion of the Court of Appeals noted, the District Court found that Kaiser "has never been guilty of discriminatory hiring or promotion at its Gramercy Plant" (Pet. App. 17a).

The broad equitable discretion vested by Section 706(g) in the federal courts to "order such affirmative action as may be appropriate" is conferred to effectuate the Congressional objective of making victims whole for injuries suffered on account of unlawful employment discrimination. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763. In Title VII litigation after discrimination has been found the court must engage in the often difficult task of determining which members of the group discriminated against are actual victims, *International Brotherhood of Teamsters* v. *United States, supra,* at 431 U.S. 371-372. Such victims are then entitled to specific relief which will make them whole for their past deprivation. As the court noted in the *Teamsters* case, *id.,* n. 61 ". . . '[i]f a discriminatee is ultimately allowed to secure a position before a laid-off linedriver [who is not a victim of discrimination] . . . he will do so because of the bidding power inherent in his [court ordered] rightful-place seniority, and not because of a preference

based on race." A court has no occasion to design specific relief for nonvictims.

Even when a court orders affirmative relief for the actual victims of discrimination, it must consider the equities of nonvictim employees whose legitimate expectations may be eroded. In balancing the competing interests of victims and nonvictims the court "must 'look to the practical realities the necessities inescapably involved in reconciling competing interests', in order to determine the 'special blend of what is necessary, what is fair, and what is workable'." *Id.*, at 375, quoting *Lemon* v. *Kurtzman*, 411 U.S. 192 (Opinion of Burger, C.J.). In performing that difficult task a court "should clearly state its reasons so that meaningful review may be had on appeal." *Teamsters, supra*, 431 U.S. at 376.

The difficulty in forming appropriate Section 706(g) remedies suggests that the district court was correct in its determination that Section 706(g) is only for courts and not private parties. But even if the equity of 706(g) need not be the exclusive domain of a chancellor, the equity that was performed by Kaiser and the Steelworkers is wholly defective. It provides the windfall remedy of fictional seniority for advancement to craft positions to minority employees who have suffered no wrong and denies to Mr. Weber and his class the color-blind treatment to which they are entitled under Title VII. Such a perverted application of 706(g) clearly does not provide a defense to Mr. Weber's *prima facie* case of unlawful employment discrimination.

B. Employers and Labor Unions Cannot by Agreement Deny Nonminority Employees the Protection of Title VII

The Steelworkers Union, unlike the government, does not justify the quota system at the Gramercy, Louisiana, Plant by relying on a court's power pursuant to Section 706(g) to order affirmative action for violation of Title VII. Rather the union contends that private affirmative action plans which classify employees by race for the purpose of alleviating minority under-representation in certain job positions is not an unfair employment practice proscribed by Title VII.

There is no doubt that Mr. Weber is at a disadvantage in securing admission to the Gramercy Plant's craft training program *vis-a-vis* his fellow employees who differ from him only, insofar as this case is concerned, by race. On its face the separate race-conscious seniority lists maintained for admission into the craft training program is precisely the type of classification that is expressly prohibited by Section 703(a) and (d) of Title VII. The fact that minority employees are under-represented in craft positions does not condone the unfair employment practice of classifying seniority by race since "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce. See *Griggs* v. *Duke Power Company*, [401 U.S. 424 at 430]; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976)." *Furnco Construction Co.* v. *Waters*, ... U.S. ....., No. 77-369 (June 29, 1978). (Emphasis in opinion).

Indeed Section 703(j) expressly provides that Title VII is not to be construed to require preferential treatment for

minority employees who are under-represented in the work force. The Steelworkers argue that that section is not applicable to this case because the agreement between the Steelworkers and Kaiser was not "required" but voluntary and therefore outside the purview of Section 703(j). This argument is premised entirely upon legislative history of Title VII. However, examination of the history shows clearly that the purpose of Section 703(j) was to make certain that quotas were not required by other provisions of the 1964 Civil Rights Act and not to authorize voluntary quotas as an exception to other provisions of the Act.

H.R. 7152, the Bill that became the Civil Rights Act of 1964, did not contain Section 703(j) [42 U.S.C. §2000e-2(j)]. See: H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963); Vass, Title VII: Legislative History, 7BC Ind. & Com. L.Rev. 431 (1966). One of the objections to Title VII, as embodied in H.R. 7152 advanced by its opponents, was that it would require or permit a racial quota system. See, *e.g.*, Remarks of Senator Smathers, 110 Cong.Rec. 8174-8175, 8550 (1964); Remarks of Senator Tower, 110 Cong.Rec. 8178-8180 (1964). The Bill's supporters even before the Amendment which added §703(j), contended that since Title VII prohibited consideration of race in employment, it therefore prohibited racial quotas favoring minorities. *E.g.*, Remarks of Senator Williams, 110 Cong.Rec. 8921 (1964).

Even in the presence of pre-Act discrimination, it was not the intent of Congress to accord special privileges to the victims of such discrimination. For example, the Interpretive Memorandum of Senators Clark and Case states:

> "Thus, for example, if a business has been discriminating in the past and as a result, has an all-white working force, when the Title comes into effect, the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. *He would not be obliged—or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or, once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" 110 Cong.Rec. 7213 (1964). (Emphasis added).

Nor was it intended that the Act should constitute a basis for preferential treatment to achieve a racial balance. Title VII and Preferential Treatment, *supra* at 684-685. The Congressional intent was expressed in the following manner:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." Interpretive Memorandum of Title VII of H.R. 7152 submitted jointly by Senators Clark and Case, Floor Manager, 110 Cong.Rec. 7212, 7213 (1964).

Notwithstanding such statements of legislative intent, an Amendment was introduced to expressly prohibit the use of quotas. The sponsor of the Amendment, Senator Allott, stated:

> ". . . I do not believe Title VII would result in imposition of a quota system.
>
> * * *
>
> "But the argument has been made, and I know that employers are also concerned with the argument. I have, therefore, prepared an amendment which I be-

lieve makes it clear that no quota system will be imposed if Title VII becomes law." 110 Cong.Rec. 9881 (1964).

Thereafter, the Dirksen-Mansfield substitute was put before the Senate, which contained §703(j). Senator Humphrey, one of the drafters, stated:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this Bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." Remarks of Senator Humphrey, 110 Cong.Rec. 12723 (1964).

The legislative history of the Act clearly condemns the use of quotas to achieve racial balance as constituting a discriminatory practice. *E.g.*, 110 Cong.Rec. 7213 (1964) (Memorandum of Senators Case and Clark); 110 Cong.Rec. 7218 (1964) (Memorandum of Senator Clark); 110 Cong. Rec. 12723 (1964) (Remarks of Senator Humphrey); 110 Cong.Rec. 14331 (1964) (Remarks of Senator John J. Williams).

Senator Clark, in the memorandum supporting adoption of the Act, responded to one objection in the following manner:

> "Objection: The bill would require employers to establish quotas for minorities in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory." 110 Cong.Rec. 7218 (1964).

If Title VII were read as the Steelworkers suggest, employers would be free to suspend the application of Title VII to nonminority employees at will. Such power simply is not vested in private parties by Title VII as *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 illustrates. That case held that an employee was not restricted to the arbitration provisions of a collective bargaining agreement which purported to be the exclusive means of resolving disputes when the employee's grievance arose under Title VII, since Title VII guaranteed access to the courts in a fashion that could not be nullified by private agreement.

In arguing that private agreements between an employer and a union did not excuse violation of Title VII, we are not contending that voluntary action has no place in making equal employment opportunity a reality. There clearly are many steps that unions and employers can take to assure that job opportunities are available on a nondiscriminatory basis. Such voluntary action should be encouraged up to the point where it deprives other employees of rights protected by Title VII. This is the threshold the courts below found was crossed and that determination should be affirmed.

C. Executive Order 11246 Provides No Defense to an Unfair Labor Practice Otherwise Prohibited by Title VII

It is clear that an Executive Order cannot take precedence over a valid act of Congress relating to the same subject. See, *i.e.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. A decision on the applicability of Title VII to the facts of this case will resolve all matters presented for review, thus there is no need to further consider to what extent Executive Order 11246 is consistent with Title VII.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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MOTION FILED
MAR 1 1979

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-432

BRIAN F. WEBER, Individually and on Behalf of all other persons similarly situated

Appellee

versus

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO

Appellants

BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES JUSTICE FOUNDATION

ROGERS & CONNELLY
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840 Commerce Building
Baton Rouge, Louisiana 70801

By: Jack N. Rogers
Michael R. Connelly

ORTLIEB PRESS BATON ROUGE

IN THE

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No. _____

BRIAN F. WEBER, Individually and On Behalf of all other persons situated

Appellee

versus

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO

Appellants

NOTICE OF MOTION

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PLEASE TAKE NOTICE that the undersigned have moved the Court for leave to submit a brief *amicus curiae*

on behalf of the United States Justice Foundation in support of judgment for appellee in the above captioned cause.

Very truly yours,

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Attorneys for Amicus Curiae
840 Commerce Building
Baton Rouge, Louisiana 70801

By _____
Jack N. Rogers

_____
Michael R. Connelly

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

BRIAN F. WEBER, Individually and On Behalf of all other persons similarly situated
Appellee

versus

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO
Appellants

MOTION FOR LEAVE TO SUBMIT A BRIEF AMICUS CURIAE

The United States Justice Foundation hereby moves this Honorable Court to grant it leave to file a brief amicus curiae in support of judgment for the appellee in the above captioned action. There has been no consent by the parties to the filing of this brief.

The organization filing this brief is a newly formed public interest legal foundation receiving support from practicing attorneys throughout the United States. Its purpose is to provide legal counsel and support to individuals and organizations which are engaged in, or may become engaged in, litigation involving the protection of constitutional rights or other matters of grave public concern. The United States Justice Foundation and the members of the bar who are its members and directors feel that the statutes of the United States which

are designed to prevent discrimination in employment practices have in fact been used by certain governmental agencies and private corporations to foster discrimination.

The members of the United States Justice Foundation do not believe that current interpretations of these laws are adequate to prevent further discrimination against individuals by either governmental or private entities. The Justice Foundation is concerned that the briefs filed by appellee and appellants in this case will deal only with the narrow issue of affirmative action programs in the situation where there has been no history of previous discrimination by the sponsor of the program, in this case Kaiser Aluminum & Chemical Corporation.

Mover wishes to address itself in this brief not only to that question but also the broader issue of whether affirmative action programs in general are violating the constitutional rights of various members of the public.

Mover has a strong interest in and knowledge of the important issues raised here. Submission of mover's brief *amicus curiae* will be of substantial assistance to this Court, will not delay resolution of any of the issues raised in this case and will in no way prejudice the rights of any of the parties to this suit.

CONCLUSION

For the above stated reasons, the United States Justice Foundation herein requests that this Court grant its motion for leave to file a brief amicus curiae.

Dated: Baton Rouge, La.
February 20, 1979.

Respectfully submitted:

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Attorneys for Mover
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By _____
Michael R. Connelly

_____
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Appellee

versus

KAISER ALUMINUM & CHEMICAL CORP., and UNITED STEELWORKERS OF AMERICA AFL-CIO

Appellants

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The interest of amicus appears from the foregoing motion.

INTRODUCTORY STATEMENT

This brief addresses itself to two questions. First, whether appellee is entitled to relief from the alleged discrimination by appellants and secondly, whether consistent with the Civil Rights Act of 1964 the Fourteenth Amendment to the United States Constitution affirmative action programs can be continued to remedy so-called past discriminations without themselves violating the Constitutional rights of citizens who had no part in the past discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides in part

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person the equal protection of the laws."

The pertinent portions of the 1964 Civil Rights Act provide as follows:

Title VII (42 U.S.C. 2000(e)2(a) Section 703(a)

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000(e)2(d) Sec. 703(d)

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Sec 703 (j), 42 U.S.C. 2000(e)(2)(j)

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of any imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

ARGUMENT

I. THE PREFERENTIAL SELECTION OF CANDIDATES FOR TRAINING PROGRAMS AT APPELLANT'S KAISER PLANT IN GRAMERCY, LOUISIANA ON THE BASIS OF RACE, VIOLATES THE 1964 CIVIL RIGHTS ACT SINCE THERE WAS NO HISTORY OF PAST DISCRIMINATION AGAINST MINORITIES.

The facts of this case have been well set out in the decisions of the lower courts and the briefs of the parties. In summary, the evidence clearly established that the appellee and members of the class he represents were denied access to certain training programs at the Kaiser Plant in Gramercy. In some cases they were denied the right to even apply for the on-the-job training programs since the programs were open only to minorities. In other cases appellee and members

of the class applied but were denied admittance to the programs despite the fact that they had greater seniority than the minority applicants selected. The sole criteria for this denial was race.

This "affirmative action" program resulted from a 1974 Labor Agreement entered into between Kaiser and the United Steelworkers of America. The relevant portions of that contract read as follows:

> "It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance Classifications in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio.
>
> "As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates."

The above cited portions of the labor agreement came about at least partially as a result of government pressure, as is reflected by the trial testimony. As the District Court determined, the Gramercy plant began implementing the program despite the fact that there was no history of racial discrimination at the plant. The goal was not to atone for past wrongs but to attempt to bring the percentage of minorities working in the various crafts in line with the percentage of minority workers in the surrounding communities. While this goal was perhaps a worthy one its direct result was a pattern of discrimination against Brian Weber and his fellow non-minority employees.

Appellants attempted to justify the program by claiming that it was a result of a collective bargaining agreement and

was in line with other affirmative action programs around the country. While it is true that the courts generally refrain from tampering with collective bargaining agreements they cannot be used to perpetuate unlawful acts such as racial discrimination.

In 1968 a District Court in Louisiana found that a seniority system was discriminatory against Negros. It rejected arguments that it could not tamper with in on the grounds that it perpetuated an illegal discrimination (*U.S. v. Local 189 United Papermakers & Paperworkers, AFL-CIO, CLC*, 282 F. Supp. 39) (E. D. La. 1968). In the case now before the court there was never any evidence presented that the seniority system of the Kaiser Plant at Gramercy was in any way discriminatory. Yet appellants themselves tampered with that system and interjected race as a criteria which in certain instances overrode the seniority system. In this instance the collective bargaining agreement established discriminatory practices for the first time at the Gramercy plant. Two 1975 cases specifically prohibit the use of collective bargaining agreements for such purposes. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed. 12 (1975) the court noted that a union cannot lawfully bargain for the establishment or continuation of discriminatory practices. The 4th Circuit reached the same conclusion in *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975).

Appellants' contention that their program is in line with other affirmative action programs is also without merit. The justification for such programs is identifiable and illegal past discrimination. In its recent decision in *University of California Regents v. Bakke* —— U.S. ——, 57 L.Ed.2d 750, 98 S.Ct. —— (1978), this court discussed the employment discrimination in great depth. After examining some prior cases in which remedies were fashioned by courts to rectify past discrimination, the court concluded:

> "But we have never approved preferential classifications in the absence of proven constitutional or statutory violations."

This has consistently been the policy of the courts. In a 1971 case the 8th Circuit found that it had no authority to order discrimination against white firemen because there was a possibility that sometime in the past there had been discrimination against some unknown blacks. The court found no history of discrimination against the parties involved and therefore held it was prohibited by the 14th Amendment and the provisions of Title VII from imposing discrimination. *Carter v. Gallagher*, 452 F.2d. 315 (8th Cir. 1971) cert. denied 406 U.S. 950. Other courts reached the same conclusion. See *EEOC v. American Telephone & Telegraph*, 419 F.Supp. 1022, (Ed. Pa. 1976); *Patterson v. Newspaper and Mail Deliver's Union of New York and Vicinity*, 514 F.2d 767 (2nd Cir. 1975); *Cox v. Allied Chemical Corp, Local 216, International Union of Operating Engineers, AFL-CIO*, 382 F.Supp. 309 (M.D. La. 1974); *Kutska v. California State College, Department of Education*, 410 F.Supp. 48 (W.D. Pa. 1976) affirmed 549 F.2d. 795; *Quailes v. Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).

In *Watkins v. United Steel Workers of America, Local 2369*, 516 F.2d 41 (1975 5th Cir.) the 5th Circuit held that even though there was a history of past discrimination, present hiring practices were nondiscrimatory and had been for over ten years. Therefore the court found no grounds for ordering affirmative action.

In the case now before this court there is no history of past discrimination and therefore no justification for imposing a quota system. Appellants have taken a lawful and reasonable seniority system for determining those entitled to enter training programs and made it unlawful by injecting *race* as a controlling criteria. See *International Brotherhood of Teamsters v. U.S.*, 97 S.Ct. 1843, 431 U.S. 324 (1977).

Nor is the fact that there is a racial imbalance at the plant a justification for discrimination. The 2nd Circuit pointed out that fact in *Rios v. Enterprise Association Steamfitters Local 638 of U. A.*, 501 F.2d 622 (2nd Cir. 1974) where it held that when a racial imbalance is unrelated to discrimination 703 (j) recognizes no justification for ordering that a preference be given to someone simply because they are in the racial minority.

This Honorable Court summed it up well when it held in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. (1971) that:

> "Discriminatory preference for any group, minority or majority is precisely and only that Congress has proscribed."

Appellee is therefore correct in his assertion that appellants are acting illegally in making race a criteria for on the job training.

II. AFFIRMATIVE ACTION PROGRAMS ARE INCONSISTENT WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT AND THE 1964 CIVIL RIGHTS ACT

The 1964 Civil Rights Act was adopted to provide relief to certain segments of the population who had suffered consistent discrimination on the basis of race or other factors. The concept of affirmative action evolved to provide specific remedies in those cases where the discrimination was identifiable as to certain individuals or groups of individuals in specific instances. The courts readily ordered affirmative action in those specific instances. *U.S. v. United Brotherhood of Carpenters & Joiners of America Local 169*, 458 F.2d 210 (7th Cir. 1972) cert. denied 409 U.S. 851; *U.S. v. Wood, Wire, and Metal Lathers International Union, Local 46*, 471 F.2d 408 (2nd Cir. 1972) cert. denied 413 U.S. 939; *U.S. v. Inter-*

national Brotherhood of Electrical Workers, Local 38, 428 F.2d 144 (6th Cir. 1970). However, in recent years the courts have taken less of that type of approach and affirmative action has generally taken place as a result of pressure from various Federal agencies. While the courts have begun to recognize the problems associated with affirmative action, Federal agencies have not. The type of problems were well articulated in this court's opinion in *University of California Regents v. Bakke*, supra.

> "Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S. 144, 172-173, 51 L.Ed.2d 229, 97 S.Ct. 966 (Brenna, J. concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth - - -. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."

The final portion of that statement is particularly applicable to situations of employment discrimination. The vast majority of minority workers entering the work force today are not the victims of past discrimination. They have in fact, because of the Civil Rights Act of 1964, generally had access to the same opportunities as their peers in the majority. This has been true to a great extent for the last ten years.

There are therefore fewer victims of past discrimination in the work force. As a result, industry wide or even plant

wide affirmative action plans help few if any minority workers who have been discriminated against. On the other hand they harm many non-minority workers who had no part in any discrimination which may have occurred years ago.

The point is, affirmative action plans have outlived their usefulness and instead of being vehicles for rectifying past discrimination they have become vehicles for bureaucratic social engineering. The problem is aggravated by the fact that every government agency seems to have a different idea of what type of social engineering needs to be done.

The outcome is confusion among employers and labor unions and a developing pattern of discrimination which has adverse effects on both employees and employers as well as the economy as a whole. Amicus contends that it is time that this court end employment discrimination for good.

CONCLUSION

For the reasons stated above, amicua believes that the lower court judgment in favor of appellee should be affirmed.

Respectfully submitted:

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CERTIFICATE

I certify that a copy of the foregoing brief amicus curiae has been served on all parties by mailing same to the attorneys of record, Michael R. Fontham Esq., 1000 Whitney Bank Bldg., New Orleans, La. 70130, F. W. Middleton, Jr. Esquire, P. O. Box 2471, Baton Rouge, La. 70821, John C. Falkenberry Esquire, 409 North 21st Street, Birmingham, Alabama 35203, Jerry L. Gardner, Jr. Esquire, 1400 Richards Bldg., 837 Gravier Street, New Orleans, La. 70112, postage prepaid, this _____ day of February, 1979.

Michael R. Connelly